

DEPARTMENT OF JUSTICE**28 CFR Part 36**

[CRT Docket No. 126; AG Order No. 3779–2016]

RIN 1190-AA63

Nondiscrimination on the Basis of Disability by Public Accommodations—Movie Theaters; Movie Captioning and Audio Description**AGENCY:** Department of Justice, Civil Rights Division.**ACTION:** Final rule.

SUMMARY: This final rule amends the Department of Justice (Department) regulation implementing title III of the Americans with Disabilities Act of 1990 (ADA), which prohibits discrimination against persons with disabilities by public accommodations and commercial facilities, including movie theaters. The rule adds specific requirements addressing the obligations of public accommodations that own, lease, or operate movie theaters to provide effective communication to patrons who are deaf or hard of hearing, or blind or have low vision. The rule requires that movie theater auditoriums provide closed movie captioning and audio description when showing a digital movie distributed with such features unless doing so would result in an undue burden or a fundamental alteration. The rule requires movie theaters to have a specified number of captioning devices and audio description devices based on the number of auditoriums in the movie theater that show digital movies. The rule does not impose any specific requirements for movie theater auditoriums that exhibit analog movies exclusively.

DATES: This rule is effective January 17, 2017. Public accommodations with movie theater auditoriums showing digital movies on December 2, 2016 must comply with the rule's requirement to provide closed movie captioning and audio description in such auditoriums by June 2, 2018. If a public accommodation converts a movie theater auditorium from an analog projection system to a system that it allows it show digital movies after December 2, 2016, the public accommodation must comply with the rule's requirement to provide closed movie captioning and audio description in such auditoriums by December 2, 2018, or within 6 months of that auditorium's complete installation of a

digital projection system, whichever is later.

FOR FURTHER INFORMATION CONTACT:

Rebecca Bond, Section Chief, Disability Rights Section, Civil Rights Division, U.S. Department of Justice, at (202) 307–0663 (voice or TTY). This is not a toll-free number. Information may also be obtained from the Department's toll-free ADA Information Line at (800) 514–0301 (voice) or (800) 514–0383 (TTY).

You may obtain copies of the rule in alternative formats by calling the ADA Information Line at (800) 514–0301 (voice) and (800) 514–0383 (TTY). This rule is also available on the Department's Web site at <http://www.ada.gov>.

SUPPLEMENTARY INFORMATION:**Relationship to Other Laws**

Section 36.103 of the Department's regulation implementing title III of the ADA states that except as otherwise provided in part 36, that part shall not be construed to allow a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 791) or the regulations issued by Federal agencies under that title. In addition, the title III regulation specifies that part 36 does not affect the obligations of a recipient of Federal financial assistance to comply with the requirements of section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) and any implementing regulations issued by Federal agencies. Finally, part 36 does not invalidate or limit the remedies, rights, and procedures provided under any Federal, State, or local law (including State common law) that affords greater or equal protection to individuals with disabilities or individuals associated with them. These provisions remain unchanged. Compliance with the Department's ADA regulations does not ensure compliance with other Federal statutes.

I. Executive Summary*A. Purpose of the Rule*

The Department of Justice is issuing this final rule in order to amend its regulation implementing title III of the ADA (42 U.S.C. 12181 *et seq.*), which covers public accommodations and commercial facilities—including movie theaters. Public accommodations that own, lease, or operate movie theaters have an existing obligation to provide effective communication to persons with disabilities through the use of auxiliary aids and services, and this rule provides greater specificity as to what those obligations are when showing digital movies. The rule explicitly requires public accommodations that

own, lease, or operate movie theaters to provide closed movie captioning¹ and audio description to patrons with hearing and vision disabilities whenever such entities exhibit digital movies that are distributed with such features, as well as to have available a specific number of fully operational captioning and audio description devices.

Title III of the ADA prohibits public accommodations from discriminating against individuals with disabilities. 42 U.S.C. 12182(a). It expressly requires owners, operators, or lessees of public accommodations to take “such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently * * * because of the absence of auxiliary aids and services” unless doing so would result in an undue burden or a fundamental alteration. 42 U.S.C. 12182(b)(2)(A)(iii). The Department's existing regulation implementing the obligation of covered entities to ensure effective communication with individuals with disabilities (28 CFR 36.303(a)–(c)) specifies that “open and closed captioning,” and “audio recordings” are examples of auxiliary aids and services. 28 CFR 36.303(b).

Despite the longstanding obligation to provide effective communication, neither closed movie captioning nor audio description is universally available at movie theaters across the United States. Data provided to the Department by the movie theater industry in mid-2015 indicates that at that time, approximately 70 percent of all movie theater auditoriums were already equipped to provide closed movie captioning and audio description; however, advocates and individuals with hearing and vision disabilities have reported that the availability of these services continues to vary significantly depending on a movie theater's location and ownership. In addition, it is the Department's view that the availability of closed movie captioning, and to a lesser extent audio description, is largely due to successful litigation brought by State attorneys general or private plaintiffs representing individuals with disabilities. As a result, although individuals with hearing and vision disabilities are an ever-increasing segment of the aging population, in many cases they continue to be unable to enjoy movies with family or friends, participate in conversations about recent movie

¹ In this rule, the Department uses the term “closed movie captioning” to refer to the provision of captions to movie theater patrons at their seats through the use of individual captioning devices.

releases, or otherwise take part in any meaningful way in this important aspect of American culture. Because the ADA's effective communication requirements apply to all public accommodations (including movie theaters) and protect the rights of persons with disabilities in every jurisdiction in the United States, all movie theaters must ensure that they meet those requirements by providing closed movie captioning and audio description upon request to all patrons who are deaf or hard of hearing, or blind or have low vision, unless doing so results in an undue burden or a fundamental alteration.

The requirements of this rule are in addition to a movie theater's current obligation to provide assistive listening systems and receivers pursuant to sections 219 and 706 of the 2010 ADA Standards for Accessible Design (2010 Standards).² Assistive listening receivers are effective for persons who are hard of hearing and who only require sound amplification. They do not, however, provide effective communication for individuals who are deaf or for individuals who are hard of hearing and for whom sound amplification is insufficient. Consequently, in order to achieve the goals and guarantees of the ADA and provide effective communication for such individuals, the Department is convinced that this rule is essential.

B. Major Provisions

The major provisions of this rule can be summarized as follows.

First, the requirements of this rule apply only to public accommodations that own, lease, or operate movie theaters with auditoriums that show movies produced in digital cinema format (digital movies). The Department is deferring to a later date the decision whether to engage in rulemaking addressing the application of the specific requirements of this rule for closed movie captioning and audio description to movie theater auditoriums that show movies exclusively in analog film format (analog movies).

Second, the rule requires that within 18 months of the date of publication of the final rule in the **Federal Register**, public accommodations that own, lease, or operate movie theaters must ensure that their movie theater auditoriums that exhibit digital movies produced or distributed with closed movie captions

and audio description provide such features to patrons with hearing and vision disabilities at all showings. The rule does not require movie theaters to add captions or audio description for movies that are not produced or distributed with these features. Nor does the rule prohibit movie theaters from showing digital movies that are not produced with captioning or audio description or from choosing to show the analog version of a particular movie, even if that movie is also produced in digital format with captioning and audio description. The rule also specifies that movie theaters that convert from analog projection systems to digital cinema projection systems after the publication date of the rule in the **Federal Register** must comply with the requirements of the rule either 6 months from the date of conversion or 24 months from the publication date, whichever is later.

Third, the rule requires movie theaters to have a minimum number of fully operational captioning devices³ and to provide them to patrons upon request. This requirement is based on the number of auditoriums at each movie theater that exhibit digital movies and is designed to ensure the availability of a sufficient number of devices for use at peak attendance times by individuals who are deaf or hard of hearing.

Fourth, the rule requires movie theaters to have a minimum number of fully operational audio description devices⁴ and to provide them to patrons upon request. The rule permits movie theaters to use the assistive listening receivers that they are already required to provide to patrons pursuant to sections 219 and 706 of the 2010 Standards in lieu of dedicated audio description devices if those assistive listening receivers have a second channel available to deliver audio description.

Fifth, the rule permits public accommodations to meet their obligation to provide captioning and audio description in their movie theaters to persons with hearing and vision disabilities through the use of alternative technologies, including open movie captioning, so long as that technology provides communication as effective as that provided to movie patrons without disabilities.

Sixth, the rule requires movie theaters that exhibit digital movies to provide the public with notice as to the availability of captioning and audio description. This provision is necessary so that movie patrons who are deaf or hard of hearing, or blind or have low vision, can find out which movies are accessible to them.

Finally, the rule requires movie theaters that exhibit digital movies to have staff available who are able to operate and respond to problems with all equipment necessary to deliver captioning and audio description and to show patrons how to use the individual devices whenever digital movies with such features are shown.

As with other effective communication obligations under the ADA, public accommodations do not have to comply with these requirements to the extent that they constitute an undue burden or a fundamental alteration.

C. Costs and Benefits

In accordance with OMB Circular A-4, the Department has prepared a Final Regulatory Assessment (Final RA), which assesses the likely costs and benefits of the rule for all movie theaters subject to the rulemaking over the projected life of the rule (15 years). The Final RA captures the total costs of this rulemaking using a baseline, which represents the Department's best assessment of the current state of the movie exhibition industry, including the availability of closed movie captioning and audio description, if the rule were not implemented. The Department's Final RA projects that the total costs, benefits, or transfer payments⁵ of this rule will not reach \$100 million in any single year, and thus, the rule is not economically significant under Executive Order 12866.

For movie theaters with auditoriums exhibiting digital movies, total costs are composed of the following components:

- Acquisition costs for captioning hardware;
- Acquisition costs for audio description hardware;
- Acquisition costs for captioning devices;
- Acquisition costs for audio description devices;

² 28 CFR 36.104 (title III) (defining the "2010 Standards" as the requirements set forth in appendices B and D to 36 CFR part 1191 and in subpart D of 28 CFR part 36). The 2010 Standards are available at http://www.ada.gov/2010ADASTandards_index.htm.

³ Section 36.303(g)(1)(iv) of this rule defines "captioning device" as "the individual device that a patron may use at any seat to view closed movie captioning."

⁴ Section 36.303(g)(1)(iii) of this rule defines "audio description device" as "the individual device that a patron may use at any seat to hear audio description."

⁵ Transfer payments are the distributional effects of a regulatory action that may arise through the transfer of resources from one group to another but do not impact the total value of resources available to society. See Office of Management and Budget, Circular No. A-4, *Regulatory Analysis* (Sept. 17, 2003), available at http://www.whitehouse.gov/omb/circulars_a004_a-4/ (last visited Sept. 12, 2016).

- Installation costs for captioning and audio description equipment;
- Replacement costs for captioning and audio description equipment;
- Staff training costs for the provision of captioning and audio description equipment; and
- Maintenance and administrative costs.

Based on the Department's calculations, total costs to the movie exhibition industry to provide closed movie captioning and audio description

in accordance with this final rule are estimated to be \$88.5 million over 15 years when discounted by 7 percent, and \$113.4 million over 15 years when discounted by 3 percent. This total costs estimate was calculated in the primary analysis of the Department's Final RA. The primary analysis analyzes the cost impact of the final rule by making assumptions about the available data, such as the current availability of closed movie captioning and audio description in movie theaters. The primary analysis

represents the Department's best estimate of the total costs that movie theaters will incur as a result of this rulemaking given the available data. Unless otherwise stated, the Department refers to cost estimates developed in the primary analysis of the Final RA throughout this rule. See chapters 2 and 3 of the Final RA for a more detailed explanation of the primary analysis and the data and assumptions relied upon to develop the total costs estimate.

TOTAL COSTS BY COST CATEGORY IN PRIMARY ANALYSIS OVER 15 YEARS
[\$ millions]

Cost category	Primary analysis 7% discounted	Primary analysis 3% discounted
Captioning Hardware Acquisition Costs	\$14.6	\$17.2
Audio Hardware Acquisition Costs	0.5	0.5
Captioning Device Acquisition Costs	15.7	17.6
Audio Device Acquisition Costs	2.4	2.8
Installation Costs	1.0	1.1
Replacement Costs	36.1	49.9
Training Costs	9.9	13.1
Maintenance and Administrative Costs	8.2	11.1
Total Costs	88.5	113.4

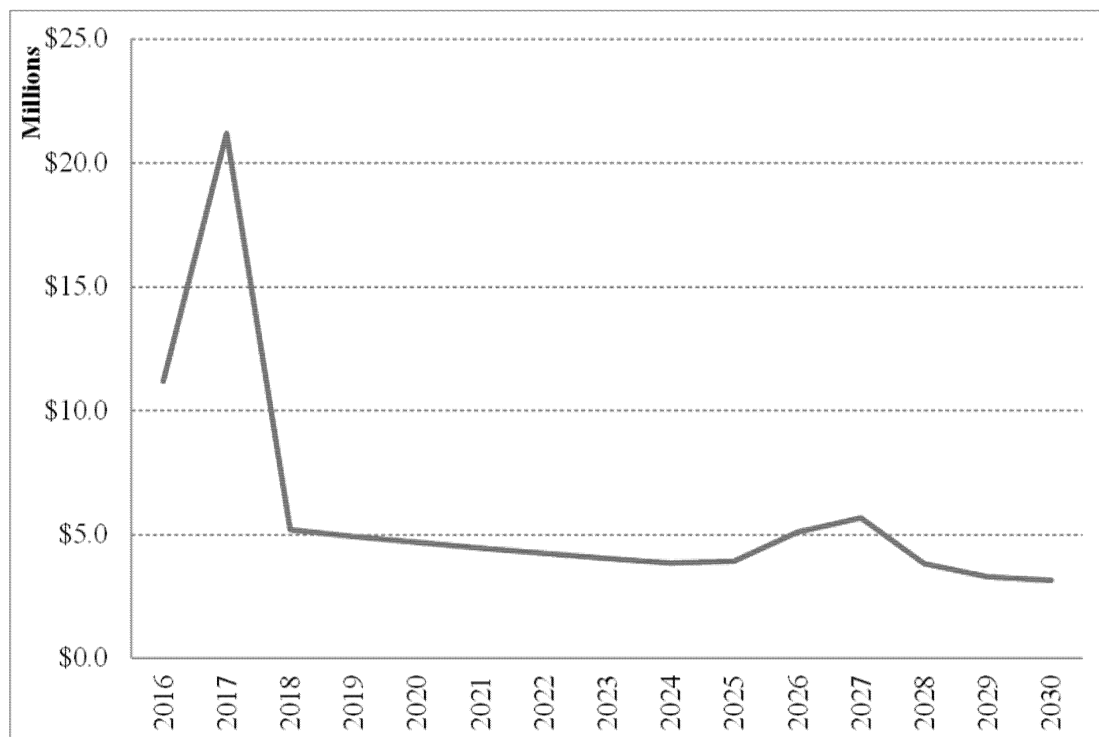
* Totals may differ due to rounding.

The highest costs occur in the first 2 years of the analysis when movie theaters incur upfront costs for acquiring and installing the captioning and audio description equipment in

accordance with the 18-month compliance date. The table below presents the annual costs to the movie exhibition industry over the 15-year analysis, and it should be noted that

these annual costs are well below the \$100 million mark that signifies an economically significant regulation under Executive Order 12866.

Annual Costs in Primary Analysis, Discounted at 7 percent (\$ millions)



Movie theaters vary greatly by number of auditoriums, which significantly impacts overall costs per facility. Thus, the analysis breaks the movie exhibition industry into four venue types based on size: Megaplex movie theaters (16+ auditoriums), multiplex movie theaters (8–15 auditoriums), miniplex movie theaters (2–7 auditoriums), and single-

auditorium movie theaters. The upfront costs per theater are calculated for the average movie theater within each venue type and presented in the table below. The largest cost per year for any single movie theater with auditoriums subject to the rulemaking would occur in the second year due to the upfront costs to acquire and install the

necessary equipment by the 18-month compliance date. The average upfront costs for a megaplex movie theater are estimated to total \$27,358, while the average upfront costs for a single-auditorium movie theater are estimated to total \$3,562.

AVERAGE PER MOVIE THEATER UPFRONT COSTS BY VENUE TYPE IN PRIMARY ANALYSIS, UNDISCOUNTED
[\$]

Venue type	Captioning hardware acquisition	Audio description hardware acquisition	Captioning device acquisition	Audio description device acquisition	Installation costs	Total upfront costs
Megaplex	\$16,158	\$205	\$8,728	\$1,470	\$797	\$27,358
Multiplex	10,772	205	5,819	980	533	18,309
Miniplex	4,488	205	4,364	490	286	9,834
Single-Auditorium	1,097	308	1,864	190	104	3,562

* Totals may differ due to rounding.

The Final RA also estimates the annualized costs of the rule by venue type, as presented in the table below. With a 7-percent discount rate, the

annualized costs of the \$88.5 million in total costs over the 15-year period of analysis are \$9.7 million. With a 3-percent discount rate, the annualized

costs of the \$113.4 million in total costs are \$9.5 million.

ANNUALIZED COSTS BY VENUE TYPE IN PRIMARY ANALYSIS
[\$ millions]

Venue type	Annualized costs 7% discounted	Annualized costs 3% discounted
Megaplex (16+ auditoriums)	\$3.2	\$3.1
Multiplex (8–15 auditoriums)	5.0	5.0
Miniplex (2–7 auditoriums)	1.0	0.9
Single-Auditorium	0.6	0.5
Total	9.7	9.5

* Totals may differ due rounding.

As part of this regulatory analysis and in accordance with the Regulatory Flexibility Act (5 U.S.C. 604), the Department has conducted a Final Regulatory Flexibility Analysis (FRFA) on the economic impact of this rule on small entities. The FRFA has been used by the Department to help determine whether small entities would be disproportionately burdened. In addition, the Department has used the FRFA to examine other ways, if possible, to accomplish the Department's goals while imposing

fewer burdens on small entities. Based on its analysis, the Department has determined that this rule will have a significant economic impact on a substantial number of small entities in the movie exhibition industry. However, as described in further detail in section VI, *infra*, the Department has taken appropriate steps to reduce the economic impact of this rule while still meeting the Department's rulemaking objectives under the ADA.

The table below presents the average upfront costs as a percentage of annual

revenue for firms categorized as small businesses according to the Small Business Association (SBA) size standard for the movie exhibition industry, which is \$38.5 million in annual revenue. For all firms with revenue greater than \$100,000,⁶ the average upfront costs are less than 1.5 percent of average annual revenue. For all firms with revenues of \$2,500,000 or greater, the average upfront costs are less than 1 percent of annual revenues.

⁶ Although the FRFA calculates the upfront costs as a percent of annual revenue for the category of firms with less than \$100,000 in annual revenue for

transparency, most of these firms likely operate single-auditorium movie theaters that exhibit analog movies exclusively and are therefore not

subject to the requirements of this rule. See *infra* section VLD for further detail.

AVERAGE UPFRONT COSTS AS A PERCENTAGE OF ANNUAL REVENUE PER FIRM, BY REVENUE CATEGORY, UNDISCOUNTED
[2015 \$]

Revenue category	Establishments per firm	Average upfront costs per establishment	Average upfront costs per firm	Average revenue per firm	Upfront costs as a percentage of revenue (%)
Less than \$100,000	1.01	\$3,562	\$3,591	\$54,508	6.6
\$100,000 to \$499,999	1.02	3,562	3,631	256,537	1.4
\$500,000 to \$999,999	1.06	9,834	10,456	714,762	1.5
\$1,000,000 to \$2,499,999	1.15	14,071	16,223	1,542,318	1.1
\$2,500,000 to \$4,999,999	1.51	20,987	31,732	3,394,864	0.9
\$5,000,000 to \$7,499,999	1.89	20,987	39,575	5,497,029	0.7
\$7,500,000 to \$9,999,999	2.58	20,987	54,124	7,697,211	0.7
\$10,000,000 to \$14,999,999	4.12	20,987	86,368	12,013,115	0.7
\$15,000,000 to \$19,999,999	4.56	20,987	95,606	14,200,444	0.7
\$20,000,000 to \$24,999,999	6.00	20,987	125,920	14,314,600	0.9
\$25,000,000 to \$29,999,999	11.00	20,987	230,853	22,734,000	1.0
\$30,000,000 to \$34,999,999	16.50	20,987	346,280	* n/a	* n/a
\$35,000,000 to \$39,999,999	8.00	20,987	167,893	27,514,000	0.6

* Annual revenue data withheld and value set to 0 to avoid disclosing information of individual businesses.

The final rule, consistent with the ADA's mandate, explicitly addresses equity and fairness considerations. The Department believes that this regulation will benefit millions of Americans, including those with and without disabilities. Although these benefits are difficult to quantify, they are nonetheless significant. Foremost among the expected benefits from the regulation is the opportunity for a greater number of individuals who are deaf or hard of hearing, or blind or have low vision, to better understand what is being said and shown in digital movies exhibited at movie theaters so that they may fully and equally participate in the movie-going experience to the same extent as persons without these disabilities. In addition to the benefits to individuals with disabilities, individuals without disabilities—who will now be able to attend, enjoy, and discuss movies with their family and friends that have disabilities—will also benefit from this rule. For example, because of this rule, a parent without a disability can now attend the movies with a child who has a hearing or vision disability. The parent will now be able to share the movie-going experience with her child and discuss the film and experience with the child. Similarly, individuals without disabilities who are learning English as an additional language or may be working to improve their literacy skills may also benefit from the availability of closed movie captioning.

While many movie theaters do provide captioning and audio description to their patrons, many still do not provide these auxiliary aids and services at all or they do not provide them regularly, creating barriers for

persons with disabilities to take part in the social and cultural movie-going experience. As a result, the Department is confident that the qualitative benefits of this rulemaking justify the associated costs.

II. The Movie Industry: Digital Movies and the Availability of Captioning and Audio Description

A. Transformation From Analog Films to Digital Movies

Digital technology has revolutionized the way movies are produced, delivered, and exhibited. For nearly 100 years, movie studios produced films exclusively in analog film format (analog movies), meaning that they were typically shot with 35 mm film, cut and spliced for editing, shipped to individual movie theaters on several large, heavy reels, and exhibited with a conventional reel-to-reel movie projector. All that changed at the beginning of the twenty-first century with the development of digital cinema technology and the commercial production of movies in digital cinema format (digital movies).⁷

Digital cinema captures images, data, and sound as a digital cinema “package” (DCP) that is stored on a hard drive or a flash drive. Digital movies are physically delivered on high resolution DVDs or removable or external hard drives, or can be transmitted to movie theaters' servers via Internet, fiber-optic,

⁷ *Star Wars: Episode II—Attack of the Clones*, released in 2002, was the first major motion picture to be shot entirely on digital video. See Helen Alexander & Rhys Blakely, *The Triumph of Digital Will Be the Death of Many Movies*, New Republic (Sept. 12, 2014), available at <http://newrepublic.com/article/119431/how-digital-cinema-took-over-35mm-film> (last visited Sept. 12, 2016).

or satellite networks. Digital production, distribution, and exhibition have many advantages over analog film, including better and longer lasting image quality, availability of higher resolution images, significantly lower production and distribution costs, ease of distribution, availability of enhanced effects such as 3D, ease of exhibition of live events or performances, greater flexibility in arranging or increasing show times to accommodate unanticipated audience demand, and remote monitoring of projection. See Rajesh K, *Digital Cinema—Advantages and Limitations*, *excITingIP.com* (Oct. 2, 2009), available at <http://www.excitingip.com/611/advantages-limitations-digital-cinema/> (last visited Sept. 12, 2016).

The shift to digital cinema has led to a precipitous decline in the filming, distribution, and exhibition of analog movies, resulting in enormous uncertainty about the future of the analog film market. See Helen Alexander & Rhys Blakely, *The Triumph of Digital Will Be the Death of Many Movies*, New Republic (Sept. 12, 2014), available at <http://www.newrepublic.com/article/119431/how-digital-cinema-took-over-35mm-film> (last visited Sept. 12, 2016); see also John Belton, *If Film is Dead, What is Cinema?*, 55 *Screen* 460, 461–63 (2014), available at <http://english.rutgers.edu/docman/documents/104-screen-2014-belton-460-70-2/file.html> (last visited Sept. 12, 2016). In 2013, Fujifilm, one of the two major producers of movie film stock, announced it was ceasing production of movie film stock. In 2014, Kodak, the other major producer of movie film stock, after first announcing it would cease production of film stock,

committed to produce only 449 million linear feet (as compared to the 12.4 billion linear feet it produced in 2006). See Michael Idato, *Quentin Tarantino, JJ Abrams Help Save Old-Fashioned Film Stock*, Sydney Morning Herald (July 31, 2014), available at <http://www.smh.com.au/entertainment/movies/quentin-tarantino-jj-abrams-help-save-old-fashioned-film-stock-20140731-zytlw.html> (last visited Sept. 12, 2016).

Some movie studios have also begun to release first-run movies exclusively in digital cinema format. For example, both Paramount Pictures and Twentieth Century Fox have completely stopped releasing movies in analog format. See Richard Verrier, *End of Film: Paramount First Studio to Stop Distributing Film Prints*, L.A. Times (Jan. 17, 2014), available at <http://articles.latimes.com/2014/jan/17/entertainment/la-et-ct-paramount-digital-20140117> (last visited Sept. 12, 2016); Matt Alderton, *Films Without Film*, Profile Magazine (2014), available at <http://profilemagazine.com/2014/twentieth-century-fox> (last visited Sept. 12, 2016). In its comment on the Department's 2014 Notice of Proposed Rulemaking, the National Association of Theater Owners (NATO) reported that several other movie studios plan to stop producing analog movies, and NATO expects independent production companies to follow suit.⁸

B. Digital Conversion of Movie Theater Auditoriums

To accommodate the motion picture industry's shift to the distribution of movies in digital format, movie theaters across the nation have rapidly transformed and have now nearly completed conversion of their auditoriums to digital projection systems. These systems consist primarily of a digital server and a digital projector and typically cost around \$60,000 to \$150,000 per auditorium. See Helen Alexander & Rhys Blakely, *The Triumph of Digital Will Be the Death of Many Movies*, New Republic (Sep. 12, 2014), available at <http://www.new>

[republic.com/article/119431/how-digital-cinema-took-over-35mm-film](http://www.newrepublic.com/article/119431/how-digital-cinema-took-over-35mm-film) (last visited Sept. 12, 2016). This transition to digital projection systems has accelerated exponentially since 2008 when the Department first sought public comment about whether it should engage in rulemaking. At that time, the information provided to the Department through public comment indicated that only 5,000 of the 38,794 auditoriums⁹ (13 percent) had been converted to digital. See Advance Notice of Proposed Rulemaking, Nondiscrimination on the Basis of Disability; Movie Captioning and Video Description, 75 FR 43467, 43473 (July 26, 2010). Based on data from July 2015 that NATO provided to the Department, the Department estimates that more than 98 percent of indoor movie auditoriums (or 38,688 auditoriums) in the United States have been converted to digital, leaving only approximately 650 indoor analog projection systems.¹⁰

As digital technology has advanced, the number of small movie theaters and those showing analog movies has also declined. From 2010 to 2014, single-auditorium movie theaters and those with up to seven auditoriums declined by approximately 25 percent while the number of movie theaters with eight or more auditoriums increased. See Motion Picture Association of America (MPAA), *Theatrical Market Statistics 2014*, at 25 (2014), available at <http://www.mpa.org/wp-content/uploads/2015/03/MPAA-Theatrical-Market-Statistics-2014.pdf> (last visited Sept. 12, 2016). Moreover, the number of analog auditoriums declined by more than 92% during that same time period. See *id.* While small, independent movie theaters have been the slowest to convert to digital technology, the Department, consistent with industry projections, anticipates that the vast majority of the remaining analog movie theaters will either convert to digital projection systems, or be forced to close because of antiquated equipment and the decline in the availability of first-run movies in analog format. See Lyndsey Hewitt, *Local Theaters Face Tough Times as 35 mm Faces Extinction*, Williamsport Sun Gazette (July 11, 2013), available at <http://www.sungazette.com/page/>

[content.detail/id/594504/Local-Theaters-Face-Tough-Times-as-35-mm-faces-extinction.html?nav=5016](http://www.sungazette.com/page/content.detail/id/594504/Local-Theaters-Face-Tough-Times-as-35-mm-faces-extinction.html?nav=5016) (last visited Sept. 12, 2016); see also Colin Covert, *Final Reel Plays Amid Digital Conversion*, Star Tribune (Aug. 27, 2012), available at <http://www.startribune.com/final-reel-plays-amid-digital-conversion/167253335/> (last visited Sept. 12, 2016); Krista Langlois, *As Analog Film Grows Obsolete, Western Towns Struggle to Keep Theaters Afloat*, High Country News (Jan. 10, 2014), available at <http://www.hcn.org/blogs/goat/as-film-grows-obsolete-western-towns-struggle-to-keep-their-theaters-open> (last visited Sept. 12, 2016).

C. Availability of Captioning and Audio Description

Captioning makes movies accessible to individuals who are deaf or hard of hearing and who are unable to benefit from the sound amplification provided by movie theaters' assistive listening receivers. Currently, captioning is delivered to patrons in one of two formats: "open" and "closed." "Open" movie captioning shows the movie dialogue and non-speech information in written form on or near the screen with the information visible to all patrons regardless of whether they need to view the captions. "Closed" movie captioning displays the movie's dialogue and non-speech information in written form on a captioning device, which is requested by the individual patron who wishes to view the captions.

The motion picture industry and the courts have consistently used the term "closed captioning" to refer to the provision of captions displayed on captioning devices at the patron's seat. In the television context, however, the term "closed captioning" has typically referred to captions that, when activated, are visible on the TV screen to all viewers. In this rule, in order to avoid confusion with the term used for captions provided in the television context (as well as in other contexts), the Department has chosen to use the terms "closed movie captioning" and "open movie captioning" to specifically refer to the captioning provided by movie theaters, except where quoting the legislative history of the ADA or specific court decisions.

Closed movie captioning first became available for analog movies in 1997 but was never available at many movie theaters.¹¹ The advent of digital cinema

⁸ See National Association of Theater Owners, Statement of Position on RIN 1190-AA63, CRT Docket No. 126, Nondiscrimination on the Basis of Disability by Public Accommodations—Movie Theaters; Movie Captioning and Audio Description 4, available at <http://www.regulations.gov/contentStreamer?documentId=DOJ-CRT-2014-0004-0401&attachmentNumber=4&disposition=attachment&contentType=pdf> (last visited Sept. 12, 2016). NATO is the largest association of motion picture theater owners in the world, and its members include the nation's ten largest movie theater companies as well as hundreds of smaller entities. Together, its member movie theaters operate 32,000 of the 40,000 movie theater auditoriums in the United States.

⁹ Although the movie industry refers to "auditoriums" as "screens" throughout its commentary, the Department believes that "auditoriums" is more accurate. Therefore, the Department refers to "auditoriums" throughout this rule.

¹⁰ The remaining venues showing movies using analog projection systems are found at drive-in movie theaters, which are not subject to the requirements of the final rule.

¹¹ There still is only one technology that provides closed movie captioning for analog movies. That technology, known as Rear Window Captioning,

spurred the development of voluntary standards to ensure that products that provide captioning would be compatible with the various digital cinema systems available for purchase and used by movie theaters. As a result, closed movie captioning became more widely available. See Michael Karagosian, *Update on Digital Cinema Support for Those with Disabilities: April 2013*, available at http://www.mkpe.com/publications/d-cinema/misc/disabilities_update.php (last visited Sept. 12, 2016).

There are currently two types of individual devices that are produced to deliver closed movie captioning for digital movies to patrons. These devices receive a transmission from a server via an infrared transmitter or Wi-Fi technology. One type of device utilizes a small, wireless screen attached to a flexible goose neck that can be placed in the cup holder at any movie theater seat and adjusted to display captions near or in a patron's line of vision when looking at the movie screen. Alternatively, special eyeglasses are available that a patron can wear that will exhibit the captions directly in front of the wearer's eyes while watching a movie.

Open movie captioning has sometimes been referred to as "burned-in" or "hardcoded" captions because in the early days of captioning they were burned in or incorporated into the analog film. Later advancements, however, enabled studios to superimpose the captions on the screen without making a burned-in copy or having to deliver a special version of the movie. Today, open movie captioning is available as a digital file that comes with the DCP. No additional equipment is required in order for a movie theater to display the open movie captions for a digital movie. The Department is aware that some movie theaters currently provide open movie captioning at certain limited showings but knows of no movie theater that routinely utilizes open movie captioning for all screenings.

Audio description, which also became available in 1997, enables individuals who are blind or have low vision to hear a spoken narration of a movie's key visual elements, including, but not limited to, the action, settings, facial expressions, costumes, and scene changes. It requires specially trained writers to create a separate script that is

does not require a separate copy of the film, and works using a movie theater's digital sound system. Captions are sent to a light-emitting display at the rear of an auditorium that then reflects and superimposes the captions onto a panel mounted at or near a patron's seat so that the captions appear close to the movie image.

then recorded and synchronized with the movie, included on the audio channels in the DCP, and delivered from a server via infrared, FM, or Wi-Fi systems to wireless headsets that patrons wear at their seats.

Movie studios and distributors determine whether a motion picture is produced and distributed with captioning and audio description. In 1997, movie studios began to substantially increase the number of movies produced with captioning in response to the Federal Communications Commission's publication of regulations requiring programming shown on television (including movies) to be captioned. See 47 CFR 79.1. Additionally, the motion picture industry's transformation to digital cinema has made the delivery of captioning and audio description to movie theater patrons easier and less costly to provide. As early as 2010, the movie industry indicated its commitment to provide closed movie captioning and audio description for almost all movies released in digital format.¹² Although the Department does not have data on the exact percentage of digital movies currently produced with captioning and audio description, the Department's research indicates that movie studios and distributors regularly include these accessibility features in the DCP at no extra charge to movie theaters. Despite this availability, however, captioning and audio description are still not consistently made available at all movie theaters, or at all showings, to patrons who are deaf or hard of hearing, or blind or have low vision.

III. Movie Theaters' Legal Obligation To Provide Captioning and Audio Description

A. The ADA and Its Legislative History

The ADA, enacted in July 1990, is a comprehensive civil rights law that broadly prohibits discrimination on the basis of disability and seeks to guarantee that individuals with disabilities are provided the same rights, privileges, and opportunities as other members of the public. The ADA's mandate covers three broad, distinct areas: Employment (title I), public services (title II), and places of public accommodation (title III).

Title III prohibits discrimination on the basis of disability in the full and

equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation. 42 U.S.C. 12182(a). It specifically categorizes a movie theater ("motion picture house") as a place of public accommodation. 42 U.S.C. 12181(7)(C). Under title III, public accommodations such as movie theaters are barred from affording an unequal or lesser service to individuals or classes of persons with disabilities than is offered to other persons. 42 U.S.C. 12182(b)(1)(A)(ii). Public accommodations must also "take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently * * * because of the absence of auxiliary aids and services" unless doing so "would fundamentally alter the nature" of the service, or "result in an undue burden." 42 U.S.C. 12182(b)(2)(A)(iii). The statute specifies that auxiliary aids and services include effective methods of making aurally or visually delivered materials available to individuals with hearing disabilities or vision disabilities, respectively, and expressly covers "taped texts." 42 U.S.C. 12103(1)(A)–(B).

While the ADA's text does not refer to movie captioning, the legislative history does. The congressional House and Senate committee reports accompanying the legislation noted that "[o]pen captioning * * * of feature films playing in movie theaters * * * is not required" by the ADA. H.R. Rep. No. 101–485, pt. 2, at 108 (1990); S. Rep. No. 101–116, at 64 (1989). At that time, the only way to create open movie captioning was to make a separate print of the movie and then laser-etch, or "burn," the captions onto that separate print.¹³ The House and Senate committees nonetheless endorsed open captioning as a means to provide individuals who are deaf or hard of hearing equal access to the movies, stating that "[f]ilmmakers are, however, encouraged to produce and distribute open-captioned versions of films and theaters are encouraged to have at least some preannounced screenings of a captioned version of feature films." S. Rep. No. 101–116, at 64; see also H.R. Rep. No. 101–485, pt. 2, at 108.

The House committee report also emphasized that the types of accommodations and services provided to individuals with disabilities "should keep pace with the rapidly changing

¹² The MPAA announced in its comment on the 2010 Advance Notice of Proposed Rulemaking that almost all new movies released in digital format will include closed movie captioning and audio description. See 2014 NPRM, 79 FR 44976, 44989 (Aug. 1, 2014), for a more detailed discussion of the MPAA's comments on the 2010 ANPRM.

¹³ Limited copies of the open-captioned version were made and given to only some movie theaters and then only after the uncaptioned version had already been distributed.

technology of the times.” H.R. Rep. No. 101–485, pt. 2, at 108. It explained that “technological advances can be expected to further enhance options for making meaningful and effective opportunities available to individuals with disabilities” and “[s]uch advances may require public accommodations to provide auxiliary aids and services in the future which today would not be required.” *Id.*

Neither closed movie captioning nor audio description existed when the ADA was enacted. Both, however, fall within the type of auxiliary aid contemplated by the statute. Given the current availability of digital movies with closed movie captioning and audio description, as well as the individual devices to provide those accessibility features to movie patrons who are deaf or hard of hearing, or blind or have low vision, the Department believes that a rule requiring movie theaters to offer closed movie captioning and audio description for digital movies fits comfortably within the meaning of the ADA’s mandate.

B. Title III’s Implementing Regulation

Title III’s implementing regulation reiterates the statute’s requirements and spells out in detail a public accommodation’s obligation to furnish auxiliary aids and services to individuals with disabilities. 28 CFR 36.303(c)(1). The regulation’s list of examples of “auxiliary aids and services” that public accommodations should provide includes “open and closed captioning” as examples of effective methods of making aurally delivered information available to individuals with hearing disabilities and “audio recordings” as an example of an effective method of making visually delivered materials available to individuals with vision disabilities. 28 CFR 36.303(b)(1)–(2). The Department updated this list in 2010 to reflect changes in technology and the auxiliary aids and services commonly used by individuals who are deaf or hard of hearing, or blind or have low vision. 75 FR 56236, 56253–54 (Sept. 15, 2010).

The title III regulation states that a public accommodation shall take those steps that may be necessary to ensure that no individual with a disability is excluded, denied services, segregated, or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the public accommodation can demonstrate that providing such aids and services would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations being offered or would result in an undue

burden. 28 CFR 36.303(a). The overarching obligation imposed by the auxiliary aids and services requirement is that a public accommodation must furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities. 28 CFR 36.303(c)(1). The type of auxiliary aid or service necessary to ensure effective communication varies in accordance with the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place. 28 CFR 36.303(c)(1)(ii). Moreover, in order to be effective, auxiliary aids and services must be provided in accessible formats and in a timely manner. *Id.* For individuals who are deaf or hard of hearing and who are unable to effectively use the assistive listening receivers currently provided in movie theaters to amplify sound, the only auxiliary aid presently available that would effectively communicate the dialogue and sounds in a movie is captioning. Likewise, for individuals who are blind or who have low vision, the only auxiliary aid presently available that would effectively communicate the visual components of a movie is audio description.

As stated above, a public accommodation is relieved of its obligation to provide a particular auxiliary aid if to do so would result in an undue burden or a fundamental alteration. To that end, the Department’s title III regulation specifically defines undue burden as “significant difficulty or expense” and, emphasizing the flexible and individualized nature of any such determination, lists five factors that must be considered when determining whether an action would result in an undue burden. 28 CFR 36.104.¹⁴ The undue burden determination entails a fact-specific examination of the cost of a specific action and the specific circumstances of

¹⁴ These factors include: (1) The nature and cost of the action; (2) the overall financial resources of the site or sites involved in the action; the number of persons employed at the site; the effect on expenses and resources; legitimate safety requirements that are necessary for safe operation, including crime prevention measures; or the impact otherwise of the action upon the operation of the site; (3) the geographic separateness, and the administrative or fiscal relationship of the site or sites in question, to any parent corporation or entity; (4) if applicable, the overall financial resources of any parent corporation or entity; the overall size of the parent corporation or entity with respect to the number of its employees; and the number, type, and location of its facilities; and (5) if applicable, the type of operation or operations of any parent corporation or entity, including the composition, structure, and functions of the workforce of the parent corporation or entity.

a particular public accommodation. This compliance limitation is intended to ensure that the needs of small businesses, as well as large businesses, are addressed and protected. The Department defines a fundamental alteration as a “modification that is so significant that it alters the essential nature of the goods, services, facilities, privileges, advantages, or accommodations offered.” U.S. Department of Justice, *Americans with Disabilities Act ADA Title III Technical Assistance Manual Covering Public Accommodations and Commercial Facilities* III–4.3600 (1993), available at <http://www.ada.gov/taman3.html>.

The current section 36.303(g) (renumbered as 36.303(h) in this final rule) provides that if the provision of a particular auxiliary aid or service by a public accommodation would result in an undue burden or a fundamental alteration, the public accommodation is not relieved of its obligation to provide auxiliary aids and services. The public accommodation is still required to provide an alternative auxiliary aid or service, if one exists, that would not result in such a burden or alteration but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the goods and services offered by the public accommodation.

It has been, and continues to be, the Department’s position that it would not be a fundamental alteration of the business of showing movies in theaters to exhibit movies already distributed with closed movie captioning and audio description in order to ensure effective communication for individuals who are deaf or hard of hearing, or blind or have low vision. The service that movie theaters provide is the screening or exhibiting of movies. The use of captioning and audio description to make that service available to those who are deaf or hard of hearing, or blind or have low vision, does not change that service. Rather, the provision of such auxiliary aids is the means by which these individuals gain access to movie theaters’ services and thereby achieve the “full and equal enjoyment,” 42 U.S.C. 12182(a), of the screening of movies. *See, e.g.,* Brief for the United States as Amicus Curiae Supporting Appellants and Urging Reversal at 15–17, *Arizona ex rel. Goddard v. Harkins Amusement Enters., Inc.*, 603 F.3d 666 (9th Cir. 2010) (No. 08–16075); *see also* 2014 NPRM, 79 FR 44976, 44982–83 (Aug. 1, 2014).¹⁵

¹⁵ The Department received no public comments challenging that position.

C. Federal Appellate Case Law

The Ninth Circuit is the only Federal court of appeals to address the question whether the ADA requires movie theaters to provide captioning and audio description to patrons who are deaf or hard of hearing, or blind or have low vision. See *Arizona ex rel. Goddard v. Harkins Amusement Enters., Inc.*, 603 F.3d 666 (9th Cir. 2010). In *Harkins*, the Ninth Circuit reversed a district court decision dismissing a complaint for failure to state a claim and held that “closed captioning” and audio description are “auxiliary aids and services” that the ADA may require movie theaters to provide. *Id.* at 668, 675. Evaluating the statute’s language, implementing regulation, and case law, the *Harkins* court reasoned that because a public accommodation has a duty to provide auxiliary aids and services, including “closed captioning” and audio description, a movie theater unlawfully discriminates when it fails to offer “closed captioning” and audio description to persons who have difficulty hearing or seeing, absent proof that those features would fundamentally alter the nature of the theater’s services or constitute an undue burden. *Id.* at 675.

IV. Rulemaking History Regarding Captioning and Audio Description

A. Prior to 2010

On September 30, 2004, the Department published an Advance Notice of Proposed Rulemaking announcing its intention to update the 1991 title II and title III ADA regulations and to adopt revised ADA Accessibility Standards. 69 FR 58768 (Sept. 30, 2004) (2004 ANPRM). While the 2004 ANPRM did not mention movie captioning or audio description, several commenters suggested that the Department issue a rule regulating these features. Subsequently, when the Department issued a Notice of Proposed Rulemaking in June 2008, 73 FR 34508 (June 17, 2008) (2008 NPRM), proposing comprehensive updates to the title III regulation relating to nondiscrimination on the basis of disability by public accommodations and commercial facilities, the Department announced that it was considering rulemaking that would require movie theaters to provide captioning and audio description for patrons who are deaf or hard of hearing, or who are blind or have low vision. 73 FR at 34530–31.

The 2008 NPRM did not propose any specific regulatory language addressing captioning and audio description. Rather, the Department emphasized that movie theaters should be left with the

discretion to select the appropriate technology should captioning and audio description be required for patrons with hearing and vision disabilities. Nonetheless, the Department inquired whether it should require movie theaters to exhibit all new movies with captioning and audio description at every showing or offer those features on a limited basis.

Most of the commenters on the 2008 NPRM who addressed the issue of captioning and audio description recommended that the Department issue regulations requiring movie theaters to provide both features at all showings unless doing so would result in an undue burden or a fundamental alteration. These commenters urged the Department to act promptly and not await completion of movie theaters’ ongoing conversion to digital cinema because the technology for captioning and audio description had been available for approximately ten years and few movie theaters provided either feature to their patrons. Commenters affiliated with the movie industry opposed the Department requiring movie theaters to offer captioning or audio description and claimed that the cost of the necessary equipment would constitute an undue burden. They also maintained that if the Department decided to issue a rule, the effective date should be delayed until movie theaters completed their conversion to digital cinema. See Advance Notice of Proposed Rulemaking, Nondiscrimination on the Basis of Disability; Movie Captioning and Video Description, 75 FR 43467 (July 26, 2010), for a more detailed discussion of comments on the 2008 NPRM.

B. The 2010 Advance Notice of Proposed Rulemaking on Captioning and Video Description

In 2010, uncertain about the status of digital conversion, the availability of captioning and audio description technology, and financial setbacks to many public accommodations due to the downturn in the economy over the ensuing 2 years, the Department published the Advance Notice of Proposed Rulemaking, Nondiscrimination on the Basis of Disability; Movie Captioning and Video Description, 75 FR 43467 (July 26, 2010) (2010 ANPRM), specifically addressing “closed [movie] captioning” and “video description.”¹⁶ The Department sought

¹⁶ The 2010 ANPRM used the term “video description” to refer to the provision of descriptive information about a movie to persons who are blind or have low vision. As discussed in this rule, the Department is now using the term “audio description.”

comments in response to 26 questions falling into six categories: Coverage of any proposed rule; transition to digital cinema; equipment and technology for both analog and digital movies; notice; training; and cost and benefits of captioning and audio description. While the Department did not propose specific regulatory language, it noted that it was considering a rule that would require 50 percent of movie theater screens (auditoriums)¹⁷ to offer captioning and audio description over a 5-year period and specifically sought comment on that approach. 75 FR at 43474.

The Department received over 1150 comments on the 2010 ANPRM. Almost all commenters favored a rule that required movie theaters to provide captioning and audio description, and the vast majority recommended that these features be required at all movie showings. Although industry commenters recommended that compliance be phased in over a 5-year schedule with 20 percent compliance each year, most commenters recommended that the requirement be implemented immediately.

C. The 2014 Notice of Proposed Rulemaking on Movie Captioning and Audio Description

After considering all of the comments on the 2010 ANPRM and the rapid rate at which movie theaters were converting from analog to digital projection systems, the Department published a Notice of Proposed Rulemaking on August 1, 2014, entitled Nondiscrimination on the Basis of Disability by Public Accommodations—Movie Theaters; Movie Captioning and Audio Description, 79 FR 44976 (Aug. 1, 2014) (2014 NPRM). In the 2014 NPRM, the Department proposed that movie theaters be required to provide captioning and audio description at all scheduled showings of any movie that is produced or otherwise distributed with such features. 79 FR at 44977. The Department also proposed that each movie theater have available a certain number of captioning devices based on the number of seats in the movie theater and have available a certain number of audio description devices based on the number of screens (auditoriums) in the theater. 79 FR 44976. The Department further proposed that movie theaters

¹⁷ In the 2010 ANPRM, the Department used the term “screens” to describe the movie theater facilities that needed to be capable of providing captioning and audio description, but the Department has replaced the term “screens” with the term “auditoriums” in the final rule. Although the terms are synonymous in the movie theater context, the Department believes that “auditoriums” is more accurate.

provide notice of the availability of captioning and audio description as well as ensure that knowledgeable staff are available to operate the equipment and assist patrons in the use of the captioning and audio description devices. 79 FR 44976–77. The Department sought public comment in response to 21 multi-part questions addressing a variety of areas, including the state of the movie industry; the proposed definitions and the nomenclature to be adopted; the compliance date; the basis for determining the number of devices required at each theater; the alternatives for analog as well as small theaters; and the Department's methodology for estimating the costs and benefits of the rule.

The Department received 436 comments from a range of stakeholders, including individuals, both with and without disabilities, advocacy groups representing individuals with disabilities, State and Federal entities, movie industry representatives, private companies, and other organizations. The Department received a joint comment submitted by the National Association of Theater Owners in conjunction with the Alexander Graham Bell Association for the Deaf and Hard of Hearing, the Association of Late Deafened Adults, the Hearing Loss Association of America, and the National Association of the Deaf (Joint Comment), which included a variety of specific recommendations.¹⁸ In addition, the Department participated in a roundtable sponsored by the Office of Advocacy of the Small Business Administration at which organizations representing small movie theaters as well as individual owners expressed their views.

Overall, the commenters supported the Department's stated purpose for proposing the rule. Individuals and industry representatives alike recognized that captioning and audio description in movie theaters is necessary in order to provide equal access to individuals with hearing and vision disabilities. Nearly all commenters disagreed, however, with the Department's basis for determining the number of devices required at each movie theater, including the number of captioning devices required. Most commenters also objected to the Department's proposed 6-month compliance date.

¹⁸ The specific recommendations proposed in the Joint Comment and all other comments are addressed in the Section-by-Section Analysis.

D. Need for Regulatory Action

1. Movies in American Culture

Going to the movies is a quintessential American experience. "Movie theaters continue to draw more people than all theme parks and major U.S. sports combined." MPAA, *Theatrical Market Statistics 2014*, at 10 (Mar. 2015), available at <http://www.mpa.org/wp-content/uploads/2015/03/MPAA-Theatrical-Market-Statistics-2014.pdf> (last visited Sept. 12, 2016). In addition, going to the movies is an important part of the American family experience. Long holiday weekends offer the movie industry some of its biggest box office sales as families gather for the holidays and attend the movies together.

It has long been recognized that movies are undoubtedly a part of our shared cultural experience and the subject of "water cooler" talk and lunch-time conversations. More than half a century ago, the Supreme Court observed that motion pictures "are a significant medium for the communication of ideas," and their "importance * * * as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952). The Court emphasized that motion pictures "may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression." *Id.* When individuals who are deaf or hard of hearing, or blind or have low vision, have the opportunity to attend and actually understand movies with the aid of captioning or audio description, they are exposed to new ideas and gain knowledge that not only contributes to their development, communication, and literacy, but more fundamentally, integrates them into society.

In response to the 2014 NPRM, commenters with hearing and vision disabilities consistently reported that they were unable to take part in the movie-going experience because of the unavailability of captioning or audio description at their local movie theaters. Many individuals stated that the lack of these accessibility features not only affected their ability to socialize and fully take part in group or family outings, but also deprived them of the opportunity to meaningfully engage in the discourse relating to current movie releases.

2. Movie Patrons With Hearing and Vision Disabilities

Individuals with hearing and vision disabilities represent a significant portion of the American population. According to the 2010 Census, 7.6 million Americans ages 15 and older reported that they experience a hearing difficulty (defined as experiencing deafness or having difficulty hearing a normal conversation, even when wearing a hearing aid). Of those individuals, 1.1 million reported having a severe difficulty hearing. Census data also reflects that 8.1 million Americans ages 15 and older reported having some difficulty seeing (defined as experiencing blindness or having difficulty seeing words or letters in ordinary newsprint even when normally wearing glasses or contact lenses). Of those individuals, 2.0 million reported that they were blind or unable to see. See U.S. Census Bureau, U.S. Department of Commerce, P70–131, *Americans with Disabilities: 2010 Household Economic Studies* at 8 (2012), available at <http://www.census.gov/prod/2012pubs/p70-131.pdf> (last visited Sept. 12, 2016).

Hearing and vision loss are highly correlated with aging. Census data indicates that for people aged 65 or older, 4.2 million have difficulty hearing and 3.8 million reported having difficulty seeing. *Id.* As the nation's population ages, the number of individuals with hearing or vision loss will increase significantly.¹⁹ Research indicates that the number of Americans with hearing loss has doubled during the past 30 years. See American Speech-Language-Hearing Association, *The Prevalence and Incidence of Hearing Loss in Adults*, available at http://www.asha.org/public/hearing/disorders/prevalence_adults.htm (last visited Sept. 12, 2016). Similarly, experts predict that by 2030 rates of severe vision loss will double in correspondence with the country's aging population. See American Foundation for the Blind, *Aging and Vision Loss Fact Sheet*, available at <http://www.afb.org/section.aspx?FolderID=3&SectionID=44&TopicID=252&DocumentID=3374> (last visited Sept. 12, 2016). These increases

¹⁹ The percentage of Americans approaching middle age or older is increasing. The 2010 Census reported that from 2000 to 2010, the percentage of adults aged 45 to 64 years increased by 31.5 percent while the population aged 65 and over grew at a rate of 15.1 percent. By contrast, the population of adults between 18 and 44 grew by only 0.6 percent. U.S. Census Bureau, U.S. Department of Commerce, C2010BR–03, *Age and Sex Composition: 2010*, at 2 (2011), available at www.census.gov/prod/cen2010/briefs/c2010br-03.pdf (last visited Sept. 12, 2016).

will likely lead to corresponding increases in the number of people who will need captioning or audio description. While not all of these individuals will necessarily take advantage of the captioning and audio description that will be provided under this rule, a significant portion of the population could directly benefit from their availability (*see infra* section V.A.4 for a more detailed discussion of the population eligible to receive benefits).

Several commenters on the 2014 NPRM objected to the Department's reliance on Census data and argued that such reliance caused the Department to overstate the number of persons with hearing and vision disabilities who will actually use the captioning and audio description devices required by this rule. Others from the deaf, hard of hearing, blind, and low vision communities asserted that the number of individuals who experience hearing and vision disabilities is actually much higher than reported in the most current Census.²⁰ According to these comments, individuals who have recently developed hearing or vision disabilities fail to define themselves as such for purposes of the formal U.S. Census process. However, none of these commenters provided data sources concerning the number of persons who are deaf, hard of hearing, blind, or have low vision, that are as comprehensive as the Census data. Thus, the Department continues to rely on Census data and believes it to be the most accurate available information regarding the number of persons in the population with these disabilities.

While the Department recognizes that it is unlikely that persons with hearing and vision disabilities attend the movies with greater regularity than do persons without disabilities, some individuals with hearing and vision disabilities undoubtedly do not go to movies because the absence of captioning and audio description makes it impossible for them to understand what is happening. The Department also notes that many people with hearing loss are unable to use the assistive listening receivers that the ADA currently

requires movie theaters to provide because these devices only provide sound amplification, and, for such individuals, amplification is insufficient to effectively communicate the dialogue and sounds taking place in the movie.²¹

3. Voluntary Compliance

Some movie industry commenters asserted that because many movie theater companies already provide captioning and audio description, the Department should refrain from regulating in this area and continue to rely on "voluntary compliance" by the movie theaters. However, individuals with hearing and vision disabilities and other commenters noted that despite the fact that captioning and audio description have been available for more than a decade and those features are widely available to movie theaters at no additional charge, many movie theaters still only show movies with captioning and audio description at intermittent times, and some movie theaters do not offer these services at all.

The Department recognizes that since the publication of its 2010 ANPRM (*see supra* section IV.B) the number of movie theaters that are showing movies with closed movie captioning and audio description, as well as their regularity in offering those features, has increased significantly. This described increase is attributable in large part to settlements of Federal or State disability rights lawsuits brought by private plaintiffs or State attorneys general against individual movie theater companies in particular jurisdictions within the United States.²² Commenters advised

²¹ "While we tend to think that the only factor in hearing loss is loudness, there are actually two factors involved: loudness and clarity. Loss generally occurs first in the high pitch, quiet range. A mild loss can cause one to miss 25–40% of speech, depending on the noise level of the surroundings and distance from the speaker. When there is background noise it becomes difficult to hear well, the speech may be audible but may not be understandable." Self Help for Hard of Hearing People of Oregon, *Facing the Challenge: A Survivor's Manual for Hard of Hearing People* (revised 4th ed. Spring 2011), available at <http://www.hearinglossky.org/hlasurvival1.html> (last visited Sept. 12, 2016).

²² *See, e.g.*, Press Release, Illinois Attorney General, *Madigan Announces Settlement with AMC Theatres* (Apr. 4, 2012), available at http://illinoisattorneygeneral.gov/pressroom/2012_04/20120404.html (last visited Sept. 12, 2016) (settlement providing for captioning and audio description technology in all AMC theaters in the State of Illinois); *Wash. State Comm'n Access Project v. Regal Cinemas, Inc.*, 293 P.3d 413 (Wash. Ct. App. 2013) (upholding trial court decision under Washington Law Against Discrimination requiring six movie theater chains to provide captioning in the screening of movies in order to accommodate persons who are deaf or hard of hearing); Consent Decree, *Arizona ex rel. v. Harkins Amusement Enters., Inc.*, No. CV07–703 PHX ROS (D. Ariz. Nov. 7, 2011); Complaint, *Ass'n of Late-*

the Department that despite the increase in the availability of captioning and audio description in many parts of the country, these features are still not consistently available at all movie theaters.

The Department believes that access to movie theaters for persons who are deaf or hard of hearing, or blind or have low vision, should not depend upon where they live.²³ The Department believes it is in the interest of both the movie theater industry and persons with disabilities to have consistent requirements for captioning and audio description throughout the United States and that this is best accomplished through revising the ADA's title III regulation. As commenters noted, a consistent, nationally applicable regulation ensures that individuals with hearing and vision disabilities can go to the movies with confidence knowing that their movie theater offers these services. The Department is persuaded that it should move forward with this regulation so that the current and ever-increasing number of individuals with hearing and vision disabilities who are unable to enjoy the services offered by movie theaters are afforded equal access to this facet of American life.

V. Regulatory Process Matters

A. Executive Orders 12866 and 13563—Summary of Regulatory Assessment

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is

Deafened Adults, Inc. v. Cinemark Holdings, Inc., No. 10548765 (Cal. Super. Ct. Nov. 30, 2010) (complaint relating to later settlement requiring Cinemark to provide closed movie captioning in all of its California theaters); Press Release, Cinemark Holdings, Inc., *Cinemark and ALDA Announce Greater Movie Theatre Accessibility for Customers Who Are Deaf or Hard-of-Hearing* (Apr. 26, 2011), available at http://www.cinemark.com/pressreleasedetail.aspx?node_id=22850 (last visited Sept. 12, 2016).

²³ It is the Department's understanding that persons who live in communities served only by smaller regional movie theater chains are less likely to have access to captioned and audio-described movies than individuals with disabilities who live in California, Arizona, or any of the major cities with movie theaters operated by Regal, Cinemark, or AMC. The Department bases this belief on its review of the information provided by Captionfish, which is a nationwide search engine that monitors which movie theaters offer both closed and open movie captioning and audio description and updates its Web site regularly. *See* Captionfish, Frequently Asked Questions, <http://www.captionfish.com/faq> (last visited Sept. 12, 2016). The Department also bases this belief on information from comments that accessibility is scarce outside of major metropolitan areas. Advocacy groups commented that they consistently receive complaints from individuals with hearing and vision disabilities who are denied equal access at movie theaters operated by companies not subject to the various settlement agreements.

²⁰ For example, a Johns Hopkins University epidemiological study conducted by Frank Lin, M.D., Ph.D., which is believed to articulate the first nationally representative estimate of hearing loss, estimates that approximately 48 million Americans have hearing loss in at least one ear, and approximately 30 million Americans have hearing loss in both ears. "Hearing loss" was defined as not being able to hear sounds of 25 decibels or less in speech frequencies. *See* News Release, Johns Hopkins Medicine, *One in Five Americans Has Hearing Loss* (Nov. 14, 2011), available at http://www.hopkinsmedicine.org/news/media/releases/one_in_five_americans_has_hearing_loss (last visited Sept. 12, 2016).

necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. The Department has assessed the costs and benefits of this final rule and believes that the rule's benefits justify its costs, and that the regulatory approach selected maximizes net benefits.

In keeping with Executive Order 12866, the Department has evaluated this rule to assess whether it would likely "[h]ave an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities." E.O. 12866, § 3(f)(1). The Department's Final RA shows that this regulation does not represent an economically "significant" regulatory action within the meaning of Executive Order 12866.

The Department's full Final RA can be found on the Department's Web site at <http://www.ada.gov>. The Department refers to sections of the Final RA throughout.

1. Purpose and Need for Rule and Scope of Regulatory Assessment

As described in greater detail in section III, *supra*, and section 1.1 of the Final RA, public accommodations that own, lease, or operate movie theaters have an existing obligation to provide effective communication to persons with disabilities through the use of auxiliary aids and services. This rule provides greater specificity as to how these effective communication obligations are met when showing digital movies that are produced, distributed, or otherwise made available with captioning and audio description.

While there has been an increase in the number of movie theaters exhibiting movies with closed movie captioning (and, to a lesser extent, audio description) due in large part to successful disability rights litigation brought by private plaintiffs and State attorneys general during the past few years, the availability of movies exhibited with closed movie captioning and audio description varies significantly across the U.S. depending upon locality and movie theater ownership. The ADA requirements for effective communication apply to all public accommodations (including

movie theaters) in every jurisdiction in the U.S. and should be consistently applied using a uniform ADA standard. The right to access movies exhibited with closed movie captioning and audio description should not depend on whether the person with a disability resides in a jurisdiction where movie theaters subject to a consent decree or settlement exhibit movies with closed movie captioning or audio description. And, even in jurisdictions where theaters exhibit movies with captioning and audio description, many do not make captioning and audio description available at all movie showings. Thus, some persons who are deaf or hard of hearing, or blind or have low vision, still cannot fully take part in movie-going outings with family or friends, join in social conversations about recent movie releases, or otherwise participate in a meaningful way in an important aspect of American culture.

The Department is convinced that regulation is warranted at this time in order to achieve the goals and promise of the ADA. Through this rule, the Department is explicitly requiring movie theaters to exhibit digital movies with closed movie captioning and audio description at all times and for all showings whenever movies are produced, distributed, or otherwise made available with such features unless to do so would result in an undue burden or a fundamental alteration.

The purpose of the Final RA is to capture the *incremental* costs of the rulemaking. As a result, the Final RA only includes the costs that movie theaters will incur as a direct result of this rulemaking. It is the Department's position that movie theaters that have already acquired the necessary equipment prior to the rulemaking have done so consistent with their longstanding obligation to provide effective communication as public accommodations, and as a result, the costs associated with providing closed movie captioning and audio description in such auditoriums cannot be directly attributed to this rulemaking. The analysis also assumes that movie theaters with auditoriums currently equipped to provide closed movie captioning and audio description would also operate and maintain this equipment in the absence of this rule. Therefore, these costs are not included in the Final RA's total costs estimation unless specifically noted.

2. Public Comments on the Initial Regulatory Assessment and Department Responses

This section discusses comments on the Initial Regulatory Assessment dated July 11, 2014 (Initial RA), provided in support of the 2014 NPRM. The Department received 436 comments during the 2014 NPRM comment period from a variety of stakeholders, including movie industry representatives, individuals with disabilities, advocacy groups representing individuals with disabilities, State and Federal entities, academic organizations, private companies, and other private individuals. Many of these comments directly addressed the assumptions, data, or methodology used in the Initial RA.

The Guidance and Section-by-Section Analysis, Appendix F, *infra*, is the primary forum for substantive responses to the comments addressing the proposed regulation generally. A summary and discussion of comments as they relate to small entities can be found below in section VI.B.

General Comments Regarding the Initial RA's Cost Estimation

The Department reviewed a number of comments suggesting that the Department underestimated the costs of complying with this rule. Commenters disagreed with a variety of cost estimates provided in the Initial RA. As a threshold matter, the Department agrees that in some instances, the estimates provided did not accurately capture a particular cost of compliance. For example, after reviewing the public comments, the Department determined that the staff training costs estimated in the Initial RA did not adequately capture the costs to comply with the operational requirements of the rule, and the equipment unit costs used in the Initial RA did not represent the most current market price of the available equipment. As a result, the Department has updated these estimates in response to the public comments received. However, the Department is confident that other estimates were reasonable and remain supported by the Department's independent research. In consideration of all comments, the Department has made adjustments where appropriate. The comments at issue and related comments are specifically addressed below.

Comments Regarding the Cost of Captioning and Audio Description Equipment

In the Initial RA, the Department estimated the costs of compliance with

the proposed rule by estimating the number of hardware units and device units the average movie theater within each venue type²⁴ would need in order to comply with the scoping requirements, which determine the number of captioning devices and audio description devices a movie theater is required to have and maintain. Because the proposed scoping for captioning devices was based on the number of seats within a movie theater, the Department estimated the average seat count across each venue type. The Department also estimated the average number of auditoriums across each venue type to estimate the number of audio description devices and hardware units needed. One commenter noted that the Department's estimates regarding the number of seats and auditoriums were too low, especially for single-auditorium and miniplex movie theaters. Because of this underestimation, the commenter believed that small movie theater establishments would be required to purchase many more captioning devices than the Department assumed in its cost analysis. Based on industry survey information provided by the National Association of Theater Owners (NATO) in its individual comment, the Department has updated the Final RA cost estimation to reflect new data regarding average auditorium counts across venue types. Data concerning average seat count is no longer relevant because the final rule's scoping for captioning devices is based on the number of auditoriums, rather than the number of seats, within a movie theater. See section 3.3 of the Final RA for a more detailed discussion of the scoping requirements of this rulemaking and their impact on the Final RA.

The Department also received multiple comments concerning the unit costs for the hardware and individual devices as well as the Department's methodology regarding these estimates. NATO provided the most recent unit cost data for all captioning and audio description equipment currently available on the market, and the Department has updated its cost estimates in the Final RA to reflect this

updated information. See section 3.4 of the Final RA for a more detailed discussion of the captioning and audio description unit costs and their impact on the Final RA.

In the Initial RA, the Department estimated the upfront costs for the captioning and audio description equipment by averaging the hardware and device unit costs of some equipment available on the market. One commenter stated that the Department's methodology concerning the average hardware and device unit costs for captioning and audio description equipment was insufficient because it only averaged the costs of the less expensive equipment. According to the commenter, many movie theaters purchase the more expensive captioning glasses offered by Sony to satisfy audience demand, and as a result, the Initial RA substantially underestimated the cost of compliance by excluding the cost of Sony's equipment from the average cost estimates. A second commenter pointed out that the intent of the RA is to estimate the minimum cost of compliance, indicating that the Department's methodology and estimate regarding the upfront costs were reasonable.

Executive Order 12866 requires the Department to estimate the costs that movie theaters will incur as a result of this rulemaking. Currently, there is more than one manufacturer of the equipment necessary to provide captioning and audio description, and the cost for the equipment varies among the manufacturers. The Department has not specified the manufacturer from which movie theaters must purchase the equipment, and movie theaters retain the discretion to purchase the equipment of their choice. As a result, the Department has included the cost for all available equipment, including the Sony equipment, in its estimate of the captioning and audio description equipment unit costs for miniplex, multiplex, and megaplex movie theaters. The Department has not added the cost of the Sony equipment to its estimate of hardware and device unit costs for single-auditorium movie theaters because the Department remains convinced that small movie theater establishments are highly unlikely to purchase the more expensive equipment. As the Department's independent research indicates, the less expensive cup holder captioning devices account for the largest percentage of the captioning device market share, and NATO advised the Department that few movie theaters outside of the top movie theater chains actually use Sony's captioning glasses.

Therefore, while other large movie theater establishments may choose to use Sony's technology, the Department has excluded this equipment from its estimate of the upfront costs for single-auditorium movie theaters. See section 3.4 of the Final RA for a more detailed discussion of Sony equipment unit costs and their impact on the Final RA.

Comments Regarding Other Cost Estimates: Staff Training, Notice, Installation, Replacement, and Operation and Maintenance

In addition to the comments addressing the captioning and audio description equipment cost estimates, the Department received a number of comments addressing other cost estimates provided in the Initial RA. These comments addressed the Department's estimate of staff training costs, notice costs, acquisition and installation costs, replacement costs, and operation and maintenance costs. Overall, commenters indicated that the Department either failed to include these costs in its estimates or that the Department's estimate for these costs was too low.

The Department originally included staff training costs associated with the rule in its estimate of the annual operations and maintenance costs, but the Department sought public comment on the amount of additional time movie theaters would spend training their employees to operate the captioning and audio description devices and to assist patrons in their use. The Department received a single comment in response to this question. One movie theater anticipated that movie theaters would spend an additional 15 minutes on employee training to ensure that their staff was knowledgeable about the equipment and in compliance with the rule's operational requirements. In consideration of this comment, the Department has included a separate estimate for the staff training costs associated with the operational requirements of the final rule. The information provided by the movie theater commenter serves as the basis for the staff training costs estimate. See section 3.7 of the Final RA for a more detailed discussion of the data, research, and assumptions used to estimate staff training costs.

The Department received only a few comments regarding its position that any cost associated with the notice requirement would be de minimis. One commenter argued that requiring notice in all places where movie times are listed would cost the industry millions of dollars annually because theaters would be required to invest in software

²⁴ In the Initial RA, the Department used the term "theater type" to describe the movie industry's classification of movie theaters based on the number of auditoriums within a movie theater complex. In the Final RA, the Department has replaced "theater type" with "venue type" in order to avoid potential confusion with the classification of movie theaters based on projection system (*i.e.*, digital vs. analog) and the distinction between indoor movie theaters and drive-in movie theaters. The Final RA divides movie theaters into four venue types: megaplex, multiplex, miniplex, and single-auditorium. See section 2.1.4 of the Final RA.

upgrades, the purchase of new signage on an ongoing basis, the purchase of digital display sets, and increased advertising space to accommodate more text. However, this commenter did not provide any information or data to support this position, and the only other commenter on this issue, a movie theater, agreed with the Department's conclusion that notice costs would be de minimis. According to this movie theater, the notice costs associated with the rule would be minimal for most exhibitors considering that the industry has largely separated itself from print advertising and adding icons for captioning and audio description would not be very difficult.

Based on the Department's independent research and the comments received, the Department maintains its position that the costs associated with the notice requirement are de minimis. The notice requirement does not require a movie theater to implement a specific form of notice. Movie theaters routinely use "CC" and "AD" or "DV" to indicate the availability of closed movie captioning and audio description in their communications currently, including on their Web sites and mobile apps, and the Department's research indicates that the inclusion of such symbols does not increase the cost of advertisements already placed or require software upgrades as one commenter indicated. For a more detailed discussion of those costs associated with this rulemaking that the Department has determined to be de minimis, see section 2.4.4.2 of the Final RA.

The Department also disagrees with commenters who criticized the Department's failure to include accurate equipment unit costs and installation costs in the Initial RA. As the Department indicated in the Initial RA, the unit cost estimates for the available equipment included the cost to install the equipment, and these unit cost estimates were based on the most up-to-date data available to the Department during the development of the Initial RA. See section 4.6 of the Initial RA. The Department has updated the equipment unit cost estimates, now referred to as "acquisition costs" in the Final RA, to reflect the most recent data concerning the unit costs for all available hardware and devices. The Final RA also now calculates installation costs as a separate cost based on a movie theater's upfront costs. For a more detailed discussion of the data, research, and assumptions used to estimate the installation costs, see section 3.5 of the Final RA.

A couple of comments addressed the replacement costs estimated in the Initial RA, specifically the replacement costs of the individual devices. One commenter estimated that the useful life of the captioning devices is about 5 years. According to NATO, industry data indicates that between 2.5 percent and 15 percent of individual devices must be replaced annually. The Department has updated the estimate of individual device replacement costs to reflect the industry data provided by NATO. To incorporate the individual devices' estimated 4-to-7-year useful life, the Department estimates that 20 percent of all captioning and audio description devices purchased as a result of this rulemaking will be replaced annually. For a more detailed discussion of the data, research, and assumptions used to estimate the replacement costs, see section 3.6 of the Final RA.

Several commenters also argued that the Department's estimate regarding operation and maintenance costs was too low. According to these commenters, the maintenance costs include costs associated with replacement batteries, periodic system testing, and upgrading software, and because these costs are relative to the cost of the equipment, the Department should consider the high cost of the devices when estimating this cost. A few comments seemed to express confusion that the operations and maintenance cost estimate in the Initial RA encompassed the costs associated with installation, replacement, and staff training. The Department has considered these comments and has included separate cost estimates for the costs associated with installation, replacement, and staff training. However, the Department's independent research confirms that 3 percent of total equipment acquisition costs represents an accurate estimate of the annual operation and maintenance costs associated with this rule, especially now that installation, replacement, and staff training costs are estimated separately. The relevant cost category has been renamed "maintenance and administrative costs" in the Final RA. For a more detailed discussion of the data, research, and assumptions used to calculate the maintenance and administrative costs of this rule, see section 3.8 of the Final RA.

Comments Regarding the Benefits Estimate

The Department discussed the qualitative benefits associated with this rule in the Initial RA. Without reliable information about the number of

individuals who would go to the movies as a result of this rule or the number of captioned and audio-described screenings already shown, the Department determined that the benefits of the rule were difficult to quantify. Nonetheless, the Department determined that many individuals, both those with and without disabilities, would benefit as a result of the rule, and that such benefits justified any associated costs. Furthermore, the Department fully expected that the guarantee of access to movies screened at movie theaters for individuals with hearing or vision impairments would spur some level of new demand for movie attendance and therefore lead to increased box office receipts.

A majority of commenters addressing the Department's benefit analysis recognized the difficulty in quantifying the benefits of the rule but agreed with the Department's conclusions concerning the direct and indirect beneficiaries that this rule would serve. Many comments focused on the number of individuals with hearing and vision disabilities, arguing that the U.S. Census vastly underestimates the number of individuals who are deaf or hard of hearing, or blind or have low vision. Commenters also stated that in addition to helping individuals who are deaf or hard of hearing, movie captioning has the potential to increase the access and enjoyment of movies for a wide variety of people, including individuals with cognitive-communication disorders, language-based learning disabilities, aphasia, central auditory processing disorders, or individuals who are learning English or may be working to improve their literacy skills. Organizations representing individuals with hearing and vision disabilities commented generally that captioning and audio description provide the keys to American culture to the extent that these services help individuals with hearing and vision disabilities to be more familiar with "everyday events," thus allowing them to be more socially integrated into society.

One commenter, however, criticized the Department's benefit analysis. This commenter asserted that the Department failed to justify the rule with relevant, evidence-based research to demonstrate that the proposed rule would advance the intended benefits. The commenter further recommended that the Department conduct an industry-wide survey of movie theaters and individuals with hearing and vision disabilities to determine the number of individuals currently seeking captioning and audio description and their willingness to pay for such services.

The Department maintains its position that the non-quantifiable benefits of this rule justify the costs of requiring captioning and audio description at movie theaters nationwide. The Department received a number of comments from individuals with hearing and vision disabilities, as well as advocacy groups, indicating that individuals with disabilities are currently seeking these accessibility services, but that these services are either consistently unavailable or insufficient to meet their needs. With the information received from such comments and the Department's independent research, the Department does not believe that conducting a nationwide survey is necessary to confirm that this rulemaking will advance the intended benefits. As section 1(c) of Executive Order 13563 highlights, agencies would be remiss to overlook the benefits "that are difficult or impossible to quantify, including equity, human dignity, [and] fairness." With respect to such benefits, this rulemaking will not only ensure that individuals who are deaf or hard of hearing, or blind or have low vision, are afforded equal access to movie theaters across the country, but will also ensure that such individuals are afforded the opportunity to participate in the social experiences that accompany a new movie's release. As a result, the Department remains convinced that this rulemaking will significantly advance the achievement of the intended benefits, and that such benefits justify

the costs associated with this rulemaking. See section V.A.4, *infra*, and chapter 5 of the Final RA for a more detailed discussion of the benefits of this rulemaking.

3. Costs—Summary of Likely Economic Impact

This section presents the calculations used to estimate the total costs resulting from the amendments to the title III regulation, which require movie theaters to provide closed movie captioning and audio description when exhibiting digital movies equipped with such features. As previously mentioned, total costs to movie theaters subject to the rulemaking include the following components:

- Acquisition costs for captioning hardware;
- Acquisition costs for audio description hardware;
- Acquisition costs for captioning devices;
- Acquisition costs for audio description devices;
- Installation costs for captioning and audio description equipment;
- Replacement costs for captioning and audio description equipment;
- Staff training costs for the provision of captioning and audio description equipment; and
- Maintenance and administrative costs.

Key Assumptions

Because movie theater complexes vary greatly by the number of

auditoriums, and the overall cost of this rule varies in direct relation to the number of auditoriums exhibiting digital movies within a movie theater, the Final RA breaks the movie exhibition industry into four venue types based on size:

- Megaplex (16+ auditoriums);
- Multiplex (8–15 auditoriums);
- Miniplex (2–7 auditoriums); and
- Single-Auditorium movie theaters.

Additionally, uncertainty exists regarding the extent to which movie theaters would offer closed movie captioning and audio description if the Department had not undertaken this rulemaking. Therefore, the Final RA estimates costs against three different baseline scenarios, which are described in greater detail in section 3.2 of the Final RA. The primary analysis incorporates the Medium Accessibility baseline, which is based on data available in NATO's 2015 Accessibility Survey. As shown in Table 1, under this baseline around 72 percent of auditoriums operated in megaplex, multiplex, and miniplex theaters are assumed to be equipped to provide closed movie captioning. Similarly, approximately 71 percent of auditoriums in these movie theaters are assumed to be equipped to provide audio description. The analysis assumes that no single-auditorium movie theater is already equipped to provide closed movie captioning or audio description.

TABLE 1—MEDIUM ACCESSIBILITY BASELINE BY VENUE TYPE—CAPTIONING AND AUDIO DESCRIPTION

Venue type	Captioning Medium Accessibility Baseline %	Audio Description Medium Accessibility Baseline %
Megaplex	72	71
Multiplex	72	71
Miniplex	72	71
Single-Auditorium	0	0

Section 2.1.3 and section 3.2 of the Final RA explain in detail the methodology and data that provide the basis for the Department's assumptions regarding the number of movie theater auditoriums currently equipped to provide closed movie captioning and audio description.

The assumptions regarding the total number of auditoriums and the distribution of these auditoriums by venue type (megaplex, multiplex, miniplex, or single-auditorium) are further detailed in section 3.1 of the

Final RA. Finally, section 3.1.3 of the Final RA describes the assumptions made in the analysis regarding the growth of auditoriums and venue types, and section 3.3 of the Final RA provides detailed assumptions and information regarding the scoping requirements by venue type.

Costs Determined To Be De Minimis

The Department has determined that there are a few cost components associated with this rulemaking that are de minimis and therefore have not been

estimated in the Final RA's total costs estimation. These include repair costs and costs to comply with the final rule's notice requirement. Repair costs are expected to be de minimis because manufacturers, movie theaters, and the Department's independent research indicate that repair of the captioning and audio description equipment is rare. If equipment breaks down, the answer is replacement rather than repair, and such costs are captured by the hardware and device replacement costs. Additionally, costs associated

with the cleaning or occasional maintenance of the devices are captured by the ongoing maintenance and administrative costs. Any additional repair costs for captioning and audio description equipment are thus expected to be de minimis.

The Department has further determined that the costs associated with the notice requirement will be de minimis. Based on comments received and the Department's independent research, the movie exhibition industry has largely moved away from print advertising in favor of digital advertising, and as one commenter indicated, digital advertising allows movie theaters to add information concerning the availability of captioning

and audio description without much difficulty. Currently, movie theaters routinely use "CC" and "AD" or "DV" to indicate the availability of closed movie captioning and audio description in their communications, and the Department's research indicates that the inclusion of such abbreviations does not increase the cost of advertisements. Therefore, the additional time and cost it will take a movie theater to add such information is negligible.

Upfront Costs

The upfront costs of this rulemaking include the costs to acquire and install the necessary captioning and audio description equipment. Movie theaters incur the majority of the upfront costs during the first 2 years of the analysis,

as movie theaters with auditoriums currently exhibiting digital movies will purchase and install the necessary equipment throughout 2016 and 2017 in accordance with the 18-month compliance date. However, the cost estimation also includes the costs incurred by new auditoriums opening after the 18-month compliance date. As a result, equipment acquisition and installation costs are incurred over the entire 15-year analysis period in the primary analysis. Table 2 shows the total equipment acquisition and installation costs incurred over the 15-year period of analysis by venue type. Overall, the upfront costs to movie theaters are expected to total \$34.2 million when discounted at 7 percent.

TABLE 2—TOTAL UPFRONT COSTS BY VENUE TYPE IN PRIMARY ANALYSIS, DISCOUNTED AT 7 PERCENT
[\$ Millions]

Venue type	Captioning hardware acquisition costs	Audio hardware acquisition costs	Captioning device acquisition costs	Audio device acquisition costs	Installation costs	Total upfront costs
Megaplex	\$5.0	\$0.1	\$4.8	\$0.8	\$0.3	\$11.0
Multiplex	7.9	0.2	7.6	1.3	0.5	17.5
Miniplex	0.9	0.0	2.0	0.2	0.1	3.3
Single-Auditorium	0.8	0.2	1.3	0.1	0.1	2.5
Total	14.6	0.5	15.7	2.4	1.0	34.2

* Totals may differ due to rounding.

Section 2.3 of the Final RA provides greater detail as to the Department's methodology and assumptions for estimating the upfront costs of this rulemaking. The data and research providing the basis for these estimates are presented in section 3.3 through section 3.5 of the Final RA.

Ongoing Costs

In addition to the upfront costs, movie theaters will incur ongoing costs as a direct result of this rulemaking. The ongoing costs quantified in the cost estimation include captioning and audio description equipment replacement

costs, staff training costs, and maintenance and administrative costs. Table 3 shows the total ongoing costs by venue type. Overall, the ongoing annual costs amount to \$54.3 million over the 15-year period of analysis when discounted at 7 percent.

TABLE 3—TOTAL ONGOING COSTS BY VENUE TYPE IN PRIMARY ANALYSIS, DISCOUNTED AT 7 PERCENT
[\$ millions]

Venue type	Replacement costs	Training costs	Maintenance and administrative costs	Total ongoing costs
Megaplex	\$11.6	\$3.5	\$2.7	\$17.8
Multiplex	18.4	5.6	4.3	28.2
Miniplex	4.0	0.7	0.8	5.5
Single-Auditorium	2.2	0.1	0.5	2.8
Total	36.1	9.9	8.2	54.3

* Totals may differ due to rounding.

Replacement costs are expected to be \$36.1 million over the 15-year period of analysis when discounted at 7 percent. Replacement costs include the costs to replace all equipment necessary to provide closed movie captioning and audio description, including the

captioning and audio description devices as well as the captioning and audio description hardware. Table 4–6 of the Final RA shows the estimated replacement costs associated with each type of equipment. The data and assumptions used to estimate the

replacement costs are discussed in greater detail in section 2.4.1 and section 3.6 of the Final RA.

Staff training is expected to cost approximately \$9.9 million over the 15-year period of analysis when discounted at 7 percent. The rule requires staff to

be available to provide patrons with captioning and audio description devices and to direct patrons on the devices' use. This requirement can most easily be met by expanding the already existing training for those employees who will be on-site to manage or oversee overall operations or the exhibition of the movies. Because the operational requirements of this rulemaking apply to all movie theaters subject to the rulemaking, including those with auditoriums that currently provide closed movie captioning and audio description, the Department has estimated the staff training costs for all movie theaters exhibiting digital

movies. Section 2.4.2 and section 3.7 of the Final RA explain the data and assumptions used to estimate the staff training costs.

Finally, maintenance and administrative costs are expected to be \$8.2 million over the 15-year period of analysis when discounted at 7 percent. These costs include, but are not limited to, the periodic ongoing maintenance, system testing, and cleaning of devices and other additional administrative costs. The data and assumptions used to estimate the maintenance and administrative costs are discussed in greater detail in section 2.4.3 and section 3.8 of the Final RA.

Total Costs

The total costs in the primary analysis are calculated based on the data and assumptions presented in chapters 2 and 3 of the Final RA. As described in section 3.2.2 of the Final RA, the primary analysis incorporates the Medium Accessibility baseline, which is based on data available in NATO's 2015 Accessibility Survey. Table 4 below shows the total costs in the primary analysis by cost category. The total cost impact of the rulemaking over the 15-year period of analysis is \$88.5 million when discounted at 7 percent, and \$113.4 million when discounted at 3 percent.

TABLE 4—TOTAL COSTS BY COST CATEGORY IN PRIMARY ANALYSIS OVER 15 YEARS
[\$ millions]

Cost category	Primary analysis 7% discounted	Primary analysis 3% discounted
Captioning Hardware Acquisition Costs	\$14.6	\$17.2
Audio Hardware Acquisition Costs	0.5	0.5
Captioning Device Acquisition Costs	15.7	17.6
Audio Device Acquisition Costs	2.4	2.8
Installation Costs	1.0	1.1
Replacement Costs	36.1	49.9
Training Costs	9.9	13.1
Maintenance and Administrative Costs	8.2	11.1
Total Costs	88.5	113.4

* Totals may differ due to rounding.

The total costs are broken down by venue type in table 5. Auditoriums in multiplex movie theaters account for more than half of the total costs (\$45.7 million) over the 15-year period of analysis, which is consistent with the fact that multiplex movie theaters operate approximately 52 percent of all

auditoriums. The costs to single-auditorium movie theaters over the 15-year period of analysis are approximately \$5.3 million when discounted at 7 percent, and \$6.3 million when discounted at 3 percent. As detailed in section 3.2.3 of the Final RA, the primary analysis assumes that

no single-auditorium movie theater is already equipped to provide closed movie captioning or audio description. As a result, it is assumed that all single-auditorium movie theaters subject to this rulemaking would need to purchase the necessary captioning and audio description equipment.

TABLE 5—TOTAL COSTS BY VENUE TYPE IN PRIMARY ANALYSIS OVER 15 YEARS
[\$ millions]

Venue type	Primary analysis 7% discounted	Primary analysis 3% discounted
Megaplex (16+ auditoriums)	\$28.7	\$37.2
Multiplex (8–15 auditoriums)	45.7	59.1
Miniplex (2–7 auditoriums)	8.8	10.8
Single-Auditorium	5.3	6.3
Total Costs	88.5	113.4

* Totals may differ due to rounding.

In table 6 below, the annualized costs are presented by venue type using 7-percent and 3-percent discount rates.

Overall, the annualized cost to the entire movie exhibition industry is \$9.7 million when using a 7-percent discount

rate, and \$9.5 million when using a 3-percent discount rate.

TABLE 6—ANNUALIZED COSTS BY VENUE TYPE IN PRIMARY ANALYSIS
[\$ millions]

Venue type	Annualized costs 7% discounted	Annualized costs 3% discounted
Megaplex (16+ auditoriums)	\$3.2	\$3.1
Multiplex (8–15 auditoriums)	5.0	5.0
Miniplex (2–7 auditoriums)	1.0	0.9
Single-Auditorium	0.6	0.5
Total	9.7	9.5

* Totals may differ due to rounding.

Sensitivity Analyses

Sensitivity analysis is an essential consideration for policy makers in evaluating the rule due to the uncertainty associated with certain key variables used in the cost estimation. The Department was able to find robust data regarding the costs of purchasing captioning and audio description equipment, the number of auditoriums in the country, and several other critical variables. However, there are some input variables that carry uncertainty. No substantive comments with data on these inputs were received in the public comments on the 2014 NPRM.

The sensitivity analyses estimate the costs of this rulemaking when using the following inputs:

- Low Accessibility and High Accessibility baselines;
- Alternate Medium Accessibility baseline;
- Alternate captioning and audio description device replacement rates;
- Increased staff training frequency;
- Single-auditorium unit cost estimates including Sony's technology;
- Increased maintenance and administrative costs; and
- Zero growth after five years.

Detailed information and data regarding these sensitivity analyses can be found in section 4.2 of the Final RA.

4. Benefits—Qualitative Discussion of Benefits

The individuals who will directly benefit from this rule are those persons with hearing or vision disabilities who, as a result of this rule, would be able to attend movies with closed movie captioning or audio description in movie theaters across the country for the first time or on a more consistent basis. Individuals who will indirectly benefit from this rule are the family and friends of persons with hearing and vision disabilities that would be able to share the movie-going experience more fully with their friends or loved ones with hearing and vision disabilities. Although the anticipated benefits of this

rulemaking are difficult to quantify, the Department remains convinced that there are significant qualitative benefits of this rulemaking that justify this regulation at this time.

The benefits of this rule are difficult to quantify because the Department has not been able to locate robust data on the rate at which persons with disabilities currently attend movies shown in movie theaters. Moreover, as a result of the increased accommodations required by this rule, it is reasonable to predict that some number of persons with disabilities will likely attend movies for the first time, some number of persons with disabilities will likely attend movies at a rate that is different than they had previously, the number of persons who attend movies as part of a larger group that includes a person with a disability will likely change, and the number of persons with disabilities who would have attended movies anyway but under the rule will have a fuller and more pleasant experience will likely also change. The Department has no feasible way of projecting those figures. In addition, the Department does not know how many people with hearing or vision disabilities currently have consistent access to movie theaters that provide closed movie captioning and audio description. Finally, the Department is not aware of any peer-reviewed academic or professional studies that monetize or quantify the societal benefit of providing closed movie captioning and audio description at movie theaters.

Though the Department cannot confidently estimate the likely number of people who would directly benefit from this rule, it has reviewed data on the number of people with hearing or vision disabilities in the United States. The Census Bureau estimates that 3.3 percent of the U.S. population ages 15 and older has difficulty seeing, which translates into a little more than 8 million individuals in 2010, and a little more than 2 million of those had “severe” difficulty seeing. At the same

time, the Census Bureau estimates that 3.1 percent of the U.S. population ages 15 and older have difficulty hearing, which was a little more than 7.5 million individuals in 2010, and approximately 1 million of them had “severe” difficulty hearing. See U.S. Census Bureau, U.S. Department of Commerce, P70–131, *Americans with Disabilities: 2010 Household Economic Studies* at 8 (2012), available at <http://www.census.gov/prod/2012pubs/p70-131.pdf> (last visited Sept. 12, 2016). While not all of these individuals would benefit from this rule, many of them will be direct beneficiaries, although they are likely to benefit from this rule in different ways and to varying extents. The type and extent of benefits can depend on personal circumstances and preferences, as well as proximity to movie theaters that otherwise would not offer captioning or audio description but for this rule. Some persons with vision and hearing disabilities have effectively been precluded from going to movies at movie theaters because the only theaters available to them do not offer closed movie captioning or audio description, offer open captioning but only at inconvenient times (such as the middle of the day during the week), or offer captioning or audio description for only a few films and not for every screening of those films. For these persons, the primary benefit will be the ability to see movies when released in movie theaters along with other movie patrons, which they otherwise would not have had the opportunity to do. They will have the value of that movie-going experience, as well as the opportunity to discuss the film socially at the same time as the rest of the movie-viewing public. A person with a hearing or vision disability who previously did not have access to a movie theater that provided closed movie captioning or audio description will experience this benefit to an extent that is different than the extent of the benefit experienced by a person with a hearing or vision disability who previously did have access to a movie

theater that consistently provided closed movie captioning and audio description. In addition, a person who cannot follow a movie at all without the assistance of closed movie captioning is likely to experience this benefit to an extent that is different than the extent of the benefit experienced by a person who can follow parts of a movie without the assistance of closed movie captioning.

There is a social value in movie viewing for many people, not just an entertainment value. As noted previously, movies are a part of our shared cultural experience, and the subject of “water cooler” talk and lunchtime conversations. The Supreme Court observed over 60 years ago that motion pictures “are a significant medium for the communication of ideas” and “may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform.” *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (footnote omitted). When individuals who are deaf or hard of hearing, or blind or have low vision, have the opportunity to attend movies that they can actually understand because of captioning or audio description, they are exposed to new ideas and gain knowledge that contributes to the development of their communication and literacy as well as their integration into society.

As previously mentioned, some persons with vision or hearing disabilities may already have access to some movie theaters with captioning or audio description capabilities, but that access may be limited to only some locations and times. Some of these people may be patronizing movie theaters now but less often than they otherwise would, or less often than they would like, if captioning or audio description were available consistently across all theaters. These people may see more movies or save time that they currently must spend monitoring those few accessible movie theaters or showings and perhaps additional time coordinating trips to the movies with family and friends. If all movie theaters are accessible to those who are deaf or hard of hearing, or blind or have low vision, then some persons will now have greater choice among multiple locations and can make choices based on other criteria such as location, times, and other amenities, just as Americans without these disabilities already do.

In addition to the direct beneficiaries of the rule discussed above, others may be indirect beneficiaries of this rule. Family and friends of persons with these disabilities who wish to go to the movies together as a shared social experience will now have greater opportunities to do so. More adults who visit elderly parents with hearing or sight limitations would presumably be able to take their parents on outings and enjoy a movie at a movie theater together, sharing the experience as they may have in the past. The Department received numerous comments from individuals who are deaf, hard of hearing, blind, or have low vision in response to its 2014 NPRM describing how they were unable to take part in the movie-going experience with their friends and family because of the unavailability of captioning or audio description. Parents with disabilities also complained that they could not answer their children’s questions about a movie that they saw together because the parents did not understand what had happened in the movie.

There is also a distributional benefit of this rule as some areas of the United States are more likely to have movie theaters with auditoriums that are already equipped to provide closed movie captioning and audio description than others. As noted previously, the Department understands that persons who live in communities served only by smaller, regional movie theater chains are far less likely to have access to captioned and audio-described movies than individuals with disabilities who live in California, Arizona, or any of the major cities with movie theaters operated by Regal, Cinemark, or AMC. Thus, it is possible that more urban areas, or certain cities or States, may have greater access than other areas, cities, or States, creating or exacerbating geographical differences in opportunities that will be equalized by this rulemaking.

Moreover, while not formally quantified, the Department expects that this guarantee of access for individuals with hearing or vision impairments to movies screened at movie theaters will spur some level of new demand for movie attendance and, therefore, lead to increased box office receipts. Unfortunately, there is little data on the demand for movie-viewing in places of public accommodation by persons who are deaf or hard of hearing, or blind or have low vision, and as such, preparing estimates of the increase in movie theater attendance is difficult.

Because the rule sets specific standards for equally effective communication at movie theaters, it

should also lead to a decrease or near elimination of confusion regarding what accommodations movie theaters must provide. The current ADA title III regulation does not contain explicit requirements specifying how movie theaters should meet their effective communication obligations, and this is one of the reasons behind the multiple private lawsuits filed throughout the country. Setting explicit requirements at the national level will lead to harmonization across the country.

And finally, there are additional benefits of the rule that relate to equity and fairness considerations generally. See E.O. 13563 § 1(c) (underscoring the importance of agency consideration of benefits “that are difficult or impossible to quantify, including equity, human dignity, [and] fairness”). The Department expects that the regulation will allow for better integration of persons with disabilities into the American social mainstream. Without captioning and audio description at movie theaters, individuals with hearing and vision disabilities commented that they were unable to participate in the social experience that attending the movies affords. Other commenters noted that movie theaters’ common practice of “relegating” movie patrons with hearing and vision disabilities to “special showings” of captioned or audio-described movies at off-peak days and times did not constitute the “full and equal access” guaranteed by the ADA. By requiring all movie theaters to provide closed movie captioning and audio description when exhibiting a digital movie distributed with such features, the Department believes that the ADA’s guarantees will be more fully met.

The Department views the most significant benefits of the rule to be those relating to issues of fairness, equity, and equal access, all of which are extremely difficult to monetize, and the Department has not been able to robustly quantify and place a dollar value on those. Regardless, the Department believes that the non-quantifiable benefits justify the costs of requiring captioning and audio description at movie theaters nationwide.

5. Alternatives

As required by Executive Order 12866, the Department considered various alternatives to this rule. Chapter 6 of the Final RA provides detailed information regarding these alternatives. Table 7 below summarizes the cost estimates for the primary analysis and other evaluated alternatives to the regulation.

TABLE 7—SUMMARY OF PRIMARY ANALYSIS AND ALTERNATIVE ANALYSES OVER 15 YEARS, DISCOUNTED AT 7 PERCENT
[\$ millions]

Cost category	Primary analysis	2-year compliance date	6-month compliance date	NPRM scoping requirement	Analog theaters included
Captioning Hardware Acquisition Costs	\$14.6	\$14.0	\$15.5	\$14.6	\$17.3
Audio Hardware Acquisition Costs	0.5	0.4	0.5	0.5	0.6
Captioning Device Acquisition Costs	15.7	15.1	16.6	36.1	15.7
Audio Device Acquisition Costs	2.4	2.4	2.6	4.4	2.5
Installation Costs	1.0	1.0	1.1	1.7	1.1
Replacement Costs	36.1	34.5	39.0	73.8	37.0
Training Costs	9.9	9.9	9.9	9.9	10.0
Maintenance and Administrative Costs	8.2	7.8	8.9	13.9	8.8
Total Costs	88.5	85.2	94.1	154.8	93.1

* Totals may differ due to rounding.

B. Executive Order 13132: Federalism

Executive Order 13132, 64 FR 43255 (Aug. 4, 1999), requires executive branch agencies to consider whether a rule will have federalism implications. That is, the rulemaking agency must determine whether the rule is likely to have substantial direct effects on State and local governments, a substantial direct effect on the relationship between the Federal government and the States and localities, or a substantial direct effect on the distribution of power and responsibilities among the different levels of government. If an agency believes that a rule is likely to have federalism implications, the agency must consult with State and local elected officials about how to minimize or eliminate the effects. This rule applies to public accommodations that exhibit movies for a fee that are covered by title III of the ADA. To the Department's knowledge there are no State or local laws that specifically address captioning and audio description. As a result, the Department has concluded that this rule does not have federalism implications.

C. Plain Language Instructions

The Department makes every effort to promote clarity and transparency in its rulemaking. In any regulation, there is a tension between drafting language that is simple and straightforward and drafting language that adequately addresses legal issues to minimize uncertainty. The Department operates a toll-free ADA Information Line—(800) 514-0301 (voice); (800) 514-0383 (TTY)—that the public is welcome to call to obtain assistance in understanding this rule.

D. Paperwork Reduction Act

Under the Paperwork Reduction Act (PRA), agencies are prohibited from conducting or sponsoring a “collection

of information” as defined by the PRA unless in advance the agency has obtained an OMB control number. 44 U.S.C. 3507. Additionally, an agency may not impose a penalty on persons for violating information collection requirements when an information collection required to have a current OMB control number does not have one. *See id.*

This rule includes a requirement that movie theaters provide information to the public about which movies are available with closed movie captioning and audio description when publishing the exhibition times for those movies. *See* § 36.303(g)(8). The Department has determined that this requirement qualifies as a collection of information subject to the PRA. Consistent with the PRA's requirements, the Department published a notice in the **Federal Register** on June 10, 2016, requesting public comment on the potential costs and burdens of this requirement. *See* 81 FR 37643. The comment period for this notice closed on August 9, 2016, and the Department published a second notice in the **Federal Register** on August 30, 2016. *See* 81 FR 59657. The 30-day comment period for the second notice closed on September 29, 2016.

The information collection requirement contained in this regulation was approved by OMB on November 3, 2016, and has been assigned OMB control number 1190-0019.

E. Unfunded Mandates Reform Act

Section 4(2) of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1503(2), excludes from coverage under that Act any proposed or final Federal regulation that “establishes or enforces any statutory rights that prohibit discrimination on the basis of race, color, religion, sex, national origin, age, handicap, or disability.” Accordingly, this rulemaking is not subject to the

provisions of the Unfunded Mandates Reform Act.

F. Duplicative or Overlapping Federal Rules

The Department is not aware of any existing Federal regulations that impose duplicative, overlapping, or conflicting requirements relative to the requirements in the final rule for movie captioning and audio description.

VI. Final Regulatory Flexibility Analysis

As directed by the Regulatory Flexibility Act of 1980, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), and by Executive Order 13272, the Department is required to consider the potential impact of the proposed rule on small entities, including small businesses, small nonprofit organizations, and small governmental jurisdictions. This process helps agencies to determine whether a rule is likely to impose a significant economic impact on a substantial number of small entities and, in turn, to consider regulatory alternatives to reduce that regulatory burden on those small entities.

This final rule applies to and affects almost all small entities categorized as “Motion Picture Theaters.” Small businesses constitute the vast majority of firms in the movie exhibition industry. The current size standard for a small movie theater business is \$38.5 million dollars in annual revenue. *See* U.S. Small Business Administration, *Table of Small Business Size Standards Matched to North American Industry Classification System Codes* at 28 (July 14, 2014), available at https://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf (last visited Sept. 12, 2016). In 2012, the latest year for which detailed breakouts by industry and annual revenue are

available, approximately 98 percent of movie theater firms met the standard for small business, and these firms managed approximately 52 percent of movie theater establishments. *See* U.S. Census Bureau, *Statistics of U.S. Businesses*, available at <https://www.census.gov/data/tables/2012/econ/sub/2012-susb-annual.html> (see Data by Enterprise Receipt Size, U.S., 6-digit NAICS) (last visited Sept. 12, 2016). The Department's analysis leads it to conclude that a substantial number of small movie theater firms will experience a significant economic impact as a result of this rule. The Department therefore presents this Final Regulatory Flexibility Analysis (FRFA). The Department has used this analysis to examine other ways, if possible, to accomplish the Department's goals with fewer burdens on small businesses, and the Department has made a number of revisions to the final rule to reduce the cost impact on small firms in the movie exhibition industry.

A. Purpose and Objective of the Final Rule Relative to Movie Theaters Categorized as Small

As previously discussed throughout this rule, the Department's existing regulation implementing the ADA's title III auxiliary aids provision reiterates the obligation of covered entities to ensure equally effective communication with individuals with disabilities and identifies, among other things, "open and closed captioning," and "audio recordings" as examples of auxiliary aids and services. 28 CFR 36.303(a)–(c). Recent technological changes in the movie exhibition industry—including widespread conversion from analog film projection to digital cinema systems—make exhibition of captioned and audio-described movies easier and less costly than before. In addition, it is the Department's understanding that, at this time, nearly all first-run motion pictures released by the major domestic movie studios include closed movie captioning (and to a lesser extent, audio description).

Despite these technological advances, movie theaters do not consistently show movies with captioning or audio description, and the availability of these features varies greatly across the country, with small movie theaters in rural areas being less likely to provide them. Thus, patrons who are deaf or hard of hearing, or blind or have low vision, are often shut out from the movie-going experience and cannot fully take part in movie-going outings with family and friends, join in social conversations about recent movie releases, or otherwise participate in a

meaningful way in an important aspect of American culture.

The Department believes that regulation is warranted at this time to explicitly require all movie theaters, including those qualifying as small entities, to exhibit movies with closed movie captioning and audio description whenever these theaters exhibit digital movies produced, distributed, or otherwise made available with such features unless to do so would result in an undue burden or a fundamental alteration. As discussed above, the Department is deferring rulemaking on application of these requirements to movie theater auditoriums that exhibit analog movies exclusively. The final rule for movie captioning and audio description rests on the existing obligation of all title III-covered facilities, such as movie theaters—regardless of size—to ensure that persons with disabilities receive "full and equal enjoyment" of their respective goods and services, including, as needed, the provision of auxiliary aids and services for persons who are deaf or hard of hearing, or blind or have low vision. The final rule imposes no independent obligation on movie theaters to provide captioning and audio description if the movie is not already available with these features.

The Department expects that implementation of the final rule will lead to consistent levels of accessibility in movie theaters across the country, and that patrons who are deaf or hard of hearing, or blind or have low vision, will be able to use captioning or audio description equipment to better understand movies being exhibited in all movie theaters.

B. Public Comments Regarding the Effects of the Rule on Small Movie Theaters

The Department received 436 comments during the 2014 NPRM comment period from movie industry representatives, individuals with disabilities, advocacy groups representing individuals with disabilities, State and Federal entities, academic organizations, private companies, and other private individuals. Comments that directly addressed the assumptions, data, or methodology used in the Initial RA have been previously discussed above in section V.A.2 and in section 1.3 of the Final RA. This section summarizes the discussion of comments regarding the effects of the rule on small movie theaters.

Proportion of Movie Theaters Qualifying as Small Entities

The Department received comments indicating that the vast majority of movie theaters qualify as small entities, which is supported by the 2012 Statistics of U.S. Businesses (SUSB) data and detailed below. *See infra* section VI.C.

Small Movie Theater Revenues and Available Resources To Comply

One commenter reported that at least one segment of the movie exhibition industry, art house cinemas, generally receive less than 50 percent of their revenue from ticket sales. Another commenter asked the Department to consider that almost half of movie theater gross receipts are paid directly to movie studios. Given these percentages and the fact that the movie exhibition industry as a whole averages a 2 percent profit margin, with small and independent theater owners often operating at an even smaller or negative profit margin, commenters asked the Department to reconsider its interpretation of cost values relative to annual revenue because these figures do not directly represent funds that are available to comply with this rule.

The Department does not have access to publicly available data that provides a consistent, independent source of movie theater profit by revenue category. As discussed in section VI.C below, available data includes firm receipt size from the 2012 SUSB.²⁵ The Department believes that this dataset is the most relevant publicly available data on annual revenue figures for the movie exhibition industry and is the best source to assess the resources available to movie theaters to comply with the rule.

Alternatives To Reduce Burdens on Small Movie Theaters

Commenters made various suggestions concerning alternatives to reduce the regulatory burden for small movie theaters. These suggestions pertained to the following areas: (1) The scoping for devices; (2) the compliance date; (3) the deferral of rulemaking for movie theaters exhibiting movies in analog format; and (4) the deferral of rulemaking for a subset of small movie theaters. The Department is aware of

²⁵ U.S. Census Bureau, *Statistics of U.S. Businesses*, available at <https://www.census.gov/data/tables/2012/econ/sub/2012-susb-annual.html> (see Data by Enterprise Receipt Size, U.S., 6-digit NAICS) (last visited Sept. 12, 2016). The information is available in an Excel file which lists all information by NAICS Code. The relevant NAICS Code for Motion Picture Theaters (except Drive-Ins) is 512131.

potential limitations to compliance for small movie theaters and has taken measures to lessen the impact on those firms. As explained in sections 1.4 and 6.1 of the Final RA and in section VI.F below, the Department has decided to defer the decision whether to engage in rulemaking with respect to movie theater auditoriums that exhibit analog movies exclusively, to reduce the scoping requirements for both captioning and audio description devices, and to increase the time movie theaters have to comply with the rule's captioning and audio description scoping requirements (now 18 months). These revisions are expected to reduce the cost impact to small firms in the movie exhibition industry.

Response to Comments From the Small Business Administration Office of Advocacy (SBA)

This section specifically addresses comments of the SBA Office of Advocacy in response to the proposed rule. Most of the concerns expressed by SBA were also expressed by other commenters.

SBA's comments on the 2014 NPRM focused on the following five issues: Lowering the scoping for captioning and audio description devices; deferral of coverage of analog theaters; providing a longer compliance date for the requirements of the rule; the breadth of the definition of "movie theater"; and the application of the undue burden defense for small business movie theaters. After consideration of these comments and related comments from other commenters, the Department has made a number of changes in the final rule.

First, the Department has significantly lowered the scoping requirements for captioning and audio description devices in response to comments from SBA and other commenters that the Department should not have used seat count as a means of determining the number of devices that would actually be needed to meet demand from people with hearing and vision disabilities. The revised scoping bases the required number of devices on the number of auditoriums in a theater showing digital movies rather than the number of seats.

Second, the Department has decided to defer the decision whether to apply the specific requirements of this rule to movie theater auditoriums that show analog movies exclusively. As discussed in the section-by-section analysis, the number of movie theaters that only show analog movies is rapidly declining, and it is unclear whether these theaters will be economically viable in the future, or whether analog

movies will even be available for commercial showings.

Third, the Department has extended the compliance date for all movie theaters subject to this rulemaking. Movie theaters now have 18 months to comply with the rule's scoping requirements, and additional time is afforded to movie theaters that convert auditoriums from an analog projection system to a digital projection system after the compliance date of the rule. After considering the comments on the 2014 NPRM, the Department has concluded that 18 months allows movie theaters sufficient time to order and install the necessary equipment while accounting for potential manufacturer backlogs or the need to raise the necessary funds to purchase the equipment.

Fourth, SBA specifically asked whether the definition of "movie theater" was intended to encompass small movie theaters that occasionally show digital movies using a Blu-ray projector, pop-ups and film festivals, or limited arrangement showings held at alternative venues. The Department believes that in most instances, the requirements of the rule will not apply in these circumstances. As the definition indicates, a "movie theater," for purposes of this rulemaking, means "a facility * * * that contains one or more auditoriums that are used primarily for the purpose of showing movies to the public for a fee." § 36.303(g)(1)(vii). Thus, an auditorium generally used for other purposes that temporarily shows movies during a film festival, even if a fee is charged, would not fall within this definition. By contrast, a movie theater that primarily shows digital movies to the public for a fee remains covered by the requirements of paragraph (g) even if it allows its auditoriums to be used for an annual film festival. Theaters with analog auditoriums that are not otherwise covered by the specific requirements of § 36.303(g) and temporarily bring in portable Blu-ray or other types of digital projectors to show digital movies are also not likely to fall within the requirements of paragraph (g) because the compliance date provision assumes conversion of the theater to a digital projection system. In addition, it is the Department's understanding that Blu-ray projection systems are not capable of delivering closed movie captions to patrons at their seat; these systems only have the capacity to show captions on the screen, something not required by this rule.

The Department notes that film festivals, pop-up movie theaters, and other alternative venues for showing

movies still qualify as places of entertainment and are considered public accommodations under the ADA. Thus, they continue to be subject to the longstanding general ADA requirement to provide effective communication under § 36.303, unless doing so would be a fundamental alteration of the program or service or would constitute an undue burden. In addition, if a festival or limited showing programmer schedules the screening of a movie that is already distributed with closed movie captions and audio description using a movie theater auditorium that is subject to the requirements in paragraph (g) as discussed above, then the effective communication obligation would require the festival to ensure that the accessible features are available at all scheduled screenings of a movie distributed with such features.

Finally, SBA asked that the Department provide additional guidance for small businesses regarding the availability of the undue burden limitation. Under the ADA, a public accommodation is relieved of its obligation to provide a particular auxiliary aid (but not all auxiliary aids) if to do so would result in an undue burden or a fundamental alteration. As stated earlier in the preamble and in existing technical assistance materials, the Department's title III regulation specifically defines undue burden as "significant difficulty or expense" and, emphasizing the flexible and individualized nature of any such determination, lists five factors that must be considered when determining whether an action would constitute an undue burden. 28 CFR 36.104; *see also* U.S. Department of Justice, *ADA Title III Technical Assistance Manual Covering Public Accommodations and Commercial Facilities* III-4.3600 (1993), available at <http://www.ada.gov/taman3.html>. These factors include: (1) The nature and cost of the action; (2) the overall financial resources of the site or sites involved in the action; the number of persons employed at the site; the effect on expenses and resources; legitimate safety requirements that are necessary for safe operation, including crime prevention measures; or the impact otherwise of the action upon the operation of the site; (3) the geographic separateness, and the administrative or fiscal relationship of the site or sites in question, to any parent corporation or entity; (4) if applicable, the overall financial resources of any parent corporation or entity; the overall size of the parent corporation or entity with respect to the number of its employees; and the number, type, and location of its

facilities; and (5) if applicable, the type of operation or operations of any parent corporation or entity, including the composition, structure, and functions of the workforce of the parent corporation or entity. 28 CFR 36.104. This limitation entails a fact-specific examination of the cost of a specific action and the specific circumstances of a particular public accommodation. This limitation is also designed to ensure that the needs of small businesses, as well as large businesses, are addressed and protected.

The Department intends to publish technical assistance that will address the requirements of the final rule and the limitations on the obligations under paragraph (g) prior to the time the rule takes effect. In addition, the Department's wide-ranging outreach, education, and technical assistance program continue to be available to assist businesses to understand their obligations under the ADA. Additional information about the ADA's requirements, including the requirement to provide effective communication and the limitations on that obligation, is also available on the Department's ADA Web site at www.ada.gov.

C. Characteristics of Impacted Small Entities

The Regulatory Flexibility Act defines a "small entity" as a small business (as defined by the SBA Size Standards) or a small organization such as a nonprofit that is "independently owned and operated" and is "not dominant in its field." See 5 U.S.C. 601(3), (4). For Motion Picture Theaters (except Drive-Ins) (NAICS Code 512131), the SBA Size Standards categorize any firm with less than \$38.5 million in annual revenue as a small business.²⁶ As a result, small entities constitute the vast majority of firms in the movie exhibition industry. The latest data providing detailed breakdowns of annual revenue by industry comes from the 2012 Statistics of U.S. Businesses (SUSB).²⁷ This dataset provides information regarding the number of firms,²⁸ establishments,²⁹ and estimated annual receipts³⁰ (annual revenue) for each of the 17 revenue size categories in the movie exhibition industry. According to this data, 12 of the 17 revenue size categories contain firms with estimated annual receipts of less than the \$38.5 million SBA size standard for a small business in this industry. Because these firms are

considered small businesses by the SBA size standards, they are also considered small entities for purposes of this FRFA. An additional category of firms with annual receipts between \$35 million and \$40 million contains firms that may or may not have annual revenue below the \$38.5 million threshold. For the purposes of this analysis, however, all firms in this category are assumed to have revenues lower than the \$38.5 million size standard and are therefore considered to be small entities.

The 2012 SUSB data on the movie exhibition industry includes both digital and analog movie theaters but excludes drive-in movie theaters. The number and percentage of firms and establishments by revenue category is presented in table 8. According to the 2012 SUSB, 1,876 movie theater firms operated 4,540 movie theater establishments. Approximately 1,833 of those firms (98 percent) are categorized as a small business according to the SBA size standard (\$38.5 million) and therefore are small entities for purposes of this FRFA. The 1,833 firms categorized as small entities operated approximately 2,381 movie theater establishments (52 percent of the total).

TABLE 8—MOTION PICTURE THEATERS (EXCEPT DRIVE-INS) FIRMS AND ESTABLISHMENTS BY REVENUE CATEGORY, 2012
STATISTICS OF U.S. BUSINESSES
[NAICS 512131]

Firms with annual revenue	Number of firms	Percentage of total firms (%)	Cumulative total of firms (%)	Number of establishments	Percentage of total establishments (%)	Cumulative total of establishments (%)
Less than \$100,000	244	13.0	13.0	246	5.4	5.4
\$100,000 to \$499,999	618	32.9	45.9	630	13.9	19.3
\$500,000 to \$999,999	332	17.7	63.6	353	7.8	27.1
\$1,000,000 to \$2,499,999	399	21.3	84.9	460	10.1	37.2
\$2,500,000 to \$4,999,999	125	6.7	91.6	189	4.2	41.4
\$5,000,000 to \$7,499,999	35	1.9	93.4	66	1.5	42.8
\$7,500,000 to \$9,999,999	19	1.0	94.5	49	1.1	43.9
\$10,000,000 to \$14,999,999	26	1.4	95.8	107	2.4	46.3
\$15,000,000 to \$19,999,999	9	0.5	96.3	41	0.9	47.2
\$20,000,000 to \$24,999,999	10	0.5	96.9	60	1.3	48.5

²⁶ U.S. Small Business Administration, *Table of Small Business Size Standards Matched to North American Industry Classification System Codes* at 28 (July 14, 2014), available at https://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf (last visited Sept. 12, 2016).

²⁷ The SBA's Office of Advocacy partially funds the Census Bureau to produce data on employer firm size including the number of firms, number of establishments, employment, and annual payroll and annual sales/receipts/revenue for employment size of firm categories by location and industry as part of the SUSB program. See U.S. Census Bureau, *Statistics of U.S. Businesses*, available at <https://www.census.gov/data/tables/2012/econ/susb/2012-susb-annual.html> (see Data by Enterprise Receipt Size, U.S., 6-digit NAICS) (last visited Sept. 12, 2016). The information is available in an Excel file which lists all information by NAICS Code.

²⁸ The U.S. Census Bureau defines a "firm" as a "business organization consisting of one or more domestic establishments in the same state and

industry that were specified under common ownership or control. The firm and the establishment are the same for single-establishment firms. For each multi-establishment firm, establishments in the same industry within a state will be counted as one firm—the firm employment and annual payroll are summed from the associated establishments." U.S. Census Bureau, *Statistics of U.S. Businesses: Glossary*, available at <https://www.census.gov/programs-surveys/susb/about/glossary.html> (last visited Sept. 12, 2016).

²⁹ The U.S. Census Bureau defines an "establishment" as "a single physical location where business is conducted or where services or industrial operations are performed." U.S. Census Bureau, *North American Industry Classification System: Frequently Asked Questions (FAQs)*, available at <http://www.census.gov/eos/www/naics/faqs/faqs.html#q2> (last visited Sept. 12, 2016).

³⁰ "Receipts (net of taxes collected from customers or clients) are defined as operating revenue for goods produced or distributed, or for

services provided. Receipts excludes local, state, and federal sales and other taxes collected from customers or clients and paid directly to a tax agency. Receipts are acquired from economic census data for establishments in industries that are in-scope to the economic census; receipts are acquired from IRS tax data for single-establishment businesses in industries that are out-of-scope to the economic census; and payroll-to-receipts ratios are used to estimate receipts for multi-establishment businesses in industries that are out-of-scope to the economic census. Statistics of U.S. Businesses tabulations provide summed establishment receipts which creates some duplication of receipts for large multi-establishment enterprises. Receipts data are available for years ending in 2 and 7 only." U.S. Census Bureau, *Statistics of U.S. Businesses: Glossary*, available at <https://www.census.gov/programs-surveys/susb/about/glossary.html> (last visited Sept. 12, 2016).

TABLE 8—MOTION PICTURE THEATERS (EXCEPT DRIVE-INS) FIRMS AND ESTABLISHMENTS BY REVENUE CATEGORY, 2012
STATISTICS OF U.S. BUSINESSES—Continued
[NAICS 512131]

Firms with annual revenue	Number of firms	Percentage of total firms (%)	Cumulative total of firms (%)	Number of establishments	Percentage of total establishments (%)	Cumulative total of establishments (%)
\$25,000,000 to \$29,999,999	6	0.3	97.2	66	1.5	49.9
\$30,000,000 to \$34,999,999	4	0.2	97.4	66	1.5	51.4
\$35,000,000 to \$39,999,999	6	0.3	97.7	48	1.1	52.4
\$40,000,000 and greater*	43	2.3	100.0	2,159	47.6	100.0
Total Firms (Less than \$40,000,000)	1,833	98	.....	2,381	52	.....
Total Firms	1,876	.....	.....	4,540	.....	.....

* This category sums the firms and establishments included in the following categories: \$40,000,000 to \$49,999,999; \$50,000,000 to \$74,999,999; \$75,000,000 to \$99,999,999; \$100,000,000 and greater.

Table 9 presents the number of firms, the number of establishments, and the annual revenue of firms by revenue size category. The calculated average annual revenue per firm and the average annual revenue per establishment are also provided.

TABLE 9—MOTION PICTURE THEATERS (EXCEPT DRIVE-INS) FIRMS AND ESTABLISHMENTS, ANNUAL REVENUE BY REVENUE CATEGORY, 2012 STATISTICS OF U.S. BUSINESSES
[NAICS 512131]

Firms with annual revenue	Number of firms	Number of establishments	Annual revenue for all firms (\$ millions)	Annual revenue per firm*	Annual revenue per establishment*
Less than \$100,000	244	246	\$13.3	\$54,508	\$54,065
\$100,000 to \$499,999	618	630	158.5	256,537	251,651
\$500,000 to \$999,999	332	353	237.3	714,762	672,241
\$1,000,000 to \$2,499,999	399	460	615.4	1,542,318	1,337,793
\$2,500,000 to \$4,999,999	125	189	424.4	3,394,864	2,245,280
\$5,000,000 to \$7,499,999	35	66	192.4	5,497,029	2,915,091
\$7,500,000 to \$9,999,999	19	49	146.2	7,697,211	2,984,633
\$10,000,000 to \$14,999,999	26	107	312.3	12,013,115	2,919,075
\$15,000,000 to \$19,999,999	9	41	127.8	14,200,444	3,117,171
\$20,000,000 to \$24,999,999	10	60	143.1	14,314,600	2,385,767
\$25,000,000 to \$29,999,999	6	66	136.4	22,734,000	2,066,727
\$30,000,000 to \$34,999,999	4	66	** n/a	** n/a	** n/a
\$35,000,000 to \$39,999,999	6	48	165.1	27,514,000	3,439,250
\$40,000,000 and greater	43	2,159	10,520	244,639,651	4,872,397

* Calculated.

** Annual revenue data withheld and value set to 0 to avoid disclosing information of individual businesses.

D. Costs to Impacted Small Entities

Annual revenue data from the SUSB program is used, together with information regarding likely per-theater upfront and ongoing annual costs (section 4.1.4 of the Final RA), to estimate the impact of this rulemaking on small entities relative to their resources. As described in section 2.1.4 of the Final RA, movie theater complexes vary greatly by the number of auditoriums that they contain, and the per-theater cost varies according to the

number of auditoriums within a theater exhibiting digital movies. Therefore, the Final RA breaks the movie exhibition industry into four venue types based on size:

- Megaplex (16+ auditoriums);
- Multiplex (8–15 auditoriums);
- Miniplex (2–7 auditoriums); and
- Single-Auditorium movie theaters.

The FRFA uses the estimated number of movie theaters by venue type to determine the cost impact per firm. Table 10 presents estimates of the

percentage of movie theaters by venue type, calculated from the 2015 distribution of auditoriums by venue type (table 3–3 of the Final RA) and the average number of auditoriums per venue type.³¹ The table indicates that approximately 40 percent of movie theater establishments are multiplex theaters, and 43 percent are either miniplex (22 percent) or single-auditorium theaters (21 percent), with the remaining 17 percent being megaplex theaters.

³¹ See NATO, Statement of Position on RIN 1190-AA63, CRT Docket No. 126, Nondiscrimination on the Basis of Disability by Public Accommodations—

Movie Theaters; Movie Captioning and Audio Description 22, available at <http://www.regulations.gov/contentStreamer?document>

Id=DOJ-CRT-2014-0004-0401&attachmentNumber=4&disposition=attachment&contentType=pdf (last visited Sept. 12, 2016).

TABLE 10—ESTIMATED NUMBER OF MOVIE THEATERS BY VENUE TYPE
[2015]

Venue type	Number of auditoriums exhibiting digital movies (2015)	÷	Average number of auditoriums by venue type	=	Estimated number of movie theaters by venue type (2015)	Percentage of movie theaters by venue type (2015)
Megaplex	12,812	÷	18	=	712	17
Multiplex	20,322	÷	12	=	1,693	40
Miniplex	4,666	÷	5	=	933	22
Single-Auditorium	889	÷	1	=	889	21
Total	38,688	÷	.....	=	4,227	100

As previously discussed, movie theaters, including small movie theaters, will incur upfront costs as well as ongoing costs to comply with the requirements of this rulemaking. Table 11 below presents the undiscounted upfront costs incurred by the average movie theater within each venue type.

TABLE 11—AVERAGE PER MOVIE THEATER UPFRONT COSTS BY VENUE TYPE IN PRIMARY ANALYSIS, UNDISCOUNTED
[\$]

Venue type	Captioning hardware acquisition	Audio description hardware acquisition	Captioning device acquisition	Audio description device acquisition	Installation costs	Total upfront costs
Megaplex	\$16,158	\$205	\$8,728	\$1,470	\$797	\$27,358
Multiplex	10,772	205	5,819	980	533	18,309
Miniplex	4,488	205	4,364	490	286	9,834
Single-Auditorium	1,097	308	1,864	190	104	3,562

* Totals may differ due to rounding.

Because movie theaters will incur the highest costs to acquire the necessary equipment, tables 12 through 19 provide the data used to estimate these costs. Table 12 presents the average number of auditoriums by venue type and estimates the relevant number of captioning hardware units required by the scoping requirements using the one-unit-per-auditorium assumption discussed in section 3.3.1 of the Final RA. The average number of auditoriums across each venue type was provided by NATO in its public comment on the 2014 NPRM.

TABLE 12—CAPTIONING HARDWARE SCOPING REQUIREMENT PER VENUE TYPE

Venue type	Average number of auditoriums	Captioning hardware units required per venue type
Megaplex (16+ auditoriums)	18	18
Multiplex (8–15 auditoriums)	12	12
Miniplex (2–7 auditoriums)	5	5
Single-Auditorium	1	1

Similarly, table 13 presents the average number of auditoriums by venue type and estimates the relevant number of audio description hardware units required by the scoping requirements using the one-unit-per-movie-theater assumption discussed in section 3.3.2 of the Final RA. The average number of auditoriums across each venue type was provided by NATO in its public comment on the 2014 NPRM.

TABLE 13—AUDIO DESCRIPTION HARDWARE SCOPING REQUIREMENTS PER VENUE TYPE

Venue type	Average number of auditoriums	Audio description hardware units required per venue type
Megaplex (16+ auditoriums)	18	1
Multiplex (8–15 auditoriums)	12	1
Miniplex (2–7 auditoriums)	5	1

TABLE 13—AUDIO DESCRIPTION HARDWARE SCOPING REQUIREMENTS PER VENUE TYPE—Continued

Venue type	Average number of auditoriums	Audio description hardware units required per venue type
Single-Auditorium	1	1

Tables 14 and 15 below estimate the minimum number of captioning devices required per venue type. The Department emphasizes that these figures are merely estimates based on the average number of auditoriums across each venue type. The exact number of captioning and audio description devices required at a particular movie theater establishment depends on the number of auditoriums showing digital movies.

TABLE 14—CAPTIONING DEVICE SCOPING REQUIREMENTS PER VENUE TYPE
[Estimated]

Venue type	Minimum number of captioning devices required per venue type
Megaplex (16+ auditoriums)	12
Multiplex (8–15 auditoriums)	8
Miniplex (2–7 auditoriums)	6
Single-Auditorium	4

TABLE 15—AUDIO DESCRIPTION DEVICE SCOPING REQUIREMENTS PER VENUE TYPE
[Estimated]

Venue type	Average number of auditoriums	Minimum number of audio description devices required per venue type
Megaplex (16+ auditoriums)	18	9
Multiplex (8–15 auditoriums)	12	6
Miniplex (2–7 auditoriums)	5	3
Single-Auditorium	1	2

Finally, the unit costs for the necessary equipment are presented in table 16, Table 17, Table 18, and Table 19 below. This information was provided in NATO’s public comment on the 2014 NPRM. For further detail regarding the unit costs used to develop the total equipment acquisition costs estimate, please see section 3.4 of the Final RA.

TABLE 16—CAPTIONING HARDWARE UNIT COSTS

Technology	Cost per captioning hardware unit
Doremi Captiview	\$864
USL	1,371
Sony	500
Average (Excluding Sony)	1,118
Average (All Technologies)	912

TABLE 17—ADDITIONAL COST FOR AUDIO DESCRIPTION HARDWARE

Technology	Cost per theater for audio description hardware
Doremi Captiview	\$615
USL	0
Sony	0
Average (Excluding Sony)	308
Average (All Technologies)	205

TABLE 18—CAPTIONING DEVICE UNIT COSTS

Technology	Cost per captioning device
Doremi Captiview	\$453
USL	479
Sony	1,250
Average (Excluding Sony)	466
Average (All Technologies)	727

TABLE 19—AUDIO DESCRIPTION DEVICE UNIT COSTS

Technology	Cost per audio description device
Doremi Captiview	\$121
USL	69
Sony	300
Average (Excluding Sony)	95
Average (All Technologies)	163

In addition to incurring upfront costs, movie theaters will also incur ongoing costs to comply with the final rule. Table 20 below presents the estimated total ongoing costs and the annual

ongoing costs that the average movie theater within each venue type will incur over the 15-year period of analysis. More detailed information about how these costs were calculated

can be found in section 3.6 (replacement costs), section 3.7 (training costs), and section 3.8 (maintenance and administrative costs) of the Final RA.

TABLE 20—AVERAGE PER MOVIE THEATER ONGOING COSTS BY VENUE TYPE IN PRIMARY ANALYSIS, UNDISCOUNTED
[\$]

Venue type	Total replacement costs	Total staff training costs	Total maintenance and administrative costs	Total ongoing costs	Ongoing costs per year
Megaplex	\$46,957	\$7,058	\$11,952	\$65,968	\$4,398
Multiplex	31,373	4,705	7,999	44,077	2,938
Miniplex	19,255	1,961	4,296	25,512	1,701
Single-Auditorium	7,566	392	1,556	9,514	634

* Totals may differ due to rounding.

Table 21 summarizes the estimated per movie theater costs by venue type, as explained above and in further detail in section 4.1.4 of the Final RA. The first column in table 21 presents the

average upfront costs (acquisition, installation) by venue type while the second column shows the average ongoing annual costs (replacement, training, and maintenance and

administrative costs) by venue type. The rightmost column shows the total undiscounted cost to an average theater by venue type over the 15-year period of analysis.

TABLE 21—AVERAGE PER MOVIE THEATER COSTS, UNDISCOUNTED
[\$]

Venue type	Average per theater upfront costs (acquisition, installation)	Average annual per theater ongoing costs (replacement, training, maintenance and administrative)	Total per theater costs over period of analysis
Megaplex	\$27,358	\$4,398	\$93,325
Multiplex	18,309	2,938	62,386
Miniplex	9,834	1,701	35,346
Single-Auditorium	3,562	634	13,076

The FRFA quantifies the impact on small entities by calculating the average upfront costs and the ongoing costs as a percentage of average annual revenue. As presented in the table above, the per movie theater costs are calculated by venue type. However, the SUSB program provides no information regarding the venue types operated by firms in each revenue category. As a result, the analysis uses the following information to estimate the venue types operated by firms in each revenue category:

- The average annual revenue per auditorium is approximately \$200,000 to \$250,000.³²
- Industry research indicates that the firms with the largest annual revenue operate most megaplex and multiplex movie theaters, whereas the firms with smaller annual revenues operate most miniplex and single-auditorium movie theaters.

Based on this information, the FRFA makes the following assumptions regarding the venue types operated by firms in each revenue category:

- Firms with less than \$499,999 in annual revenue operate single-auditorium movie theaters.³³ As presented in table 9, firms with less than \$100,000 in annual revenue have an average annual revenue of \$54,065 per theater; firms with \$100,000 to \$499,999 in annual revenue have an average annual revenue of \$251,651 per theater. These average revenue figures are close to or below NATO's estimated annual revenue per auditorium.
- Firms with annual revenues from \$500,000 to \$999,999 operate miniplex movie theaters (2–7 auditoriums). The average annual revenue in this category is \$714,762, which is equivalent to the revenue generated by approximately three auditoriums according to NATO's

estimated annual revenue per auditorium.

- Firms with annual revenues between \$1 million and \$2.5 million operate miniplex and multiplex movie theaters. Costs to firms with annual revenues between \$1 million and \$2.5 million are an average of the costs to miniplex and multiplex movie theaters.

- Firms with annual revenues between \$2.5 million and \$40 million operate multiplex and megaplex movie theaters. Costs to firms with revenues between \$2.5 million and \$40 million are estimated using a weighted average³⁴ of the costs to multiplex and megaplex movie theaters based on the number of movie theaters presented in table 10.

Using the above assumptions, table 22 presents the estimated upfront and ongoing annual costs for small entity movie theater firms, grouped into four revenue categories.

TABLE 22—VENUE TYPE, UPFRONT COSTS, AND ONGOING COSTS BY REVENUE CATEGORY IN FRFA

Firms with annual revenue of	Venue type used to estimate costs to firms	Estimated upfront costs to average movie theater establishment	Estimated annual ongoing costs to average movie theater establishment
Less than \$499,999	Single-Screen	\$3,562	\$634
\$500,000 to \$999,999	Miniplex	9,834	1,701
\$1,000,000 to \$2,499,999	Miniplex/Multiplex	* 14,071	* 2,320
\$2,500,000 to \$39,999,999	Multiplex/Megaplex	** 20,987	** 3,370

* Average of Miniplex/Multiplex costs.

** Weighted Average of Multiplex and Megaplex costs based on number of theaters (table 10).

Table 23 below shows the upfront costs as a percentage of annual revenue for firms by revenue category. The

average costs per firm are derived from the average number of establishments per firm (first column) and the average

upfront costs per theater for each revenue category (second column). As the table shows, the upfront costs make

³² NATO, Attachment A, Spring 2014 Accessibility Survey Results, submitted in RIN 1190-AA63, CRT Docket No. 126, Nondiscrimination on the Basis of Disability by Public Accommodations—Movie Theaters; Movie Captioning and Audio Description, available at <https://www.regulations.gov/contentStreamer?documentId=DOJ-CRT-2014-0004-0401&attachmentNumber=3&disposition=attachment&contentType=pdf> (last visited Sept. 12, 2016).

³³ According to the 2012 SUSB, firms with less than \$499,999 in annual revenue operated 19.3 percent of all establishments in 2012. See U.S. Census Bureau, *Statistics of U.S. Businesses*, available at <http://www.census.gov/econ/susb/> (see Data by Enterprise Receipt Size, U.S., 6-digit NAICS) (last visited Sept. 12, 2016). The information is available in an Excel file which lists all information by NAICS Code. The relevant NAICS Code for Motion Picture Theaters (except

Drive-Ins) is 512131. This figure is slightly less than the estimate in table 10, which finds that 21 percent of all movie theaters are single-auditorium.

³⁴ According to table 10, there are approximately 2,405 megaplex and multiplex theaters, of which 712 are megaplexes and 1,693 are multiplexes. The weighted average assumes that 30 percent of the movie theaters in this revenue category are megaplex movie theaters (712/2,405) and 70 percent are multiplex movie theaters (1,693/2,405).

up less than 1.5 percent of annual revenue for all firms except those with revenues of less than \$100,000. For all firms with revenues of \$2,500,000 or greater, the upfront cost was less than 1 percent of annual revenues.

As discussed previously, the data from the 2012 SUSB that is provided in this section also includes data from movie theaters operating auditoriums that exhibit analog movies exclusively, which are not subject to the requirements of this rulemaking. Based on its own independent research and analysis, the Department believes that most firms with annual revenue less than \$100,000 are not subject to the requirements of this rule. Although the FRFA calculates the costs as a percent

of annual revenue for this category of firms, the information available to the Department supports its view that most of these firms are likely operating single auditoriums that exhibit analog movies exclusively and are therefore not subject to the requirements of this rule. First, according to industry experts, the average annual revenue per auditorium is approximately \$200,000 to \$250,000, thus making it reasonable to assume that firms with annual revenue less than \$100,000 operate single-auditorium movie theaters. Second, the Department received information from industry experts that the majority of single-auditorium movie theaters still use analog projection systems. Third, commenters indicated that the

remaining movie theaters with analog projection systems have not converted to digital projection systems because they cannot afford the high cost to do so (\$60,000 to \$150,000 per auditorium³⁵). Therefore, it is reasonable to assume that most of the movie theater firms with less than \$100,000 in annual revenue operate movie theaters with analog auditoriums that are not subject to this rulemaking. In addition, all movie theaters with auditoriums exhibiting digital movies—including any firms with less than \$100,000 in annual revenue—continue to have available to them the individualized and fact-specific undue burden limitation specified in § 36.303(a).

TABLE 23—AVERAGE UPFRONT COSTS AS A PERCENTAGE OF ANNUAL REVENUE PER FIRM, BY REVENUE CATEGORY, UNDISCOUNTED
[2015 \$]

Revenue category	Establishments per firm	Average upfront costs per establishment	Average upfront costs per firm	Average revenue per firm	Upfront costs as a percentage of revenue
Less than \$100,000 *	1.01	\$3,562	\$3,591	\$54,508	6.6
\$100,000 to \$499,999	1.02	3,562	3,631	256,537	1.4
\$500,000 to \$999,999	1.06	9,834	10,456	714,762	1.5
\$1,000,000 to \$2,499,999	1.15	14,071	16,223	1,542,318	1.1
\$2,500,000 to \$4,999,999	1.51	20,987	31,732	3,394,864	0.9
\$5,000,000 to \$7,499,999	1.89	20,987	39,575	5,497,029	0.7
\$7,500,000 to \$9,999,999	2.58	20,987	54,124	7,697,211	0.7
\$10,000,000 to \$14,999,999	4.12	20,987	86,368	12,013,115	0.7
\$15,000,000 to \$19,999,999	4.56	20,987	95,606	14,200,444	0.7
\$20,000,000 to \$24,999,999	6.00	20,987	125,920	14,314,600	0.9
\$25,000,000 to \$29,999,999	11.00	20,987	230,853	22,734,000	1.0
\$30,000,000 to \$34,999,999	16.50	20,987	346,280	** n/a	** n/a
\$35,000,000 to \$39,999,999	8.00	20,987	167,893	27,514,000	0.6

* Likely firms operating single-auditorium movie theaters that exhibit analog movies exclusively, and therefore not subject to this rulemaking.

** Annual revenue data withheld and value set to 0 to avoid disclosing information of individual businesses.

Table 24 presents the average annual ongoing cost as a percentage of average annual revenue for firms in each

revenue category. For all firms, except those with annual revenues of \$100,000

or less, annual ongoing costs make up less than 0.3 percent of annual revenue.

TABLE 24—AVERAGE ANNUAL ONGOING COSTS AS A PERCENTAGE OF ANNUAL REVENUE PER FIRM, BY REVENUE CATEGORY, UNDISCOUNTED
[2015 \$]

Revenue category	Establishment/firm	Average ongoing costs per establishment	Average annual ongoing cost per firm	Average revenue per firm	Annual ongoing cost as a percentage of revenue
Less than \$100,000 *	1.01	\$634	\$639	\$54,508	1.2
\$100,000 to \$499,999	1.02	634	647	256,537	0.3
\$500,000 to \$999,999	1.06	1,701	1,808	714,762	0.3
\$1,000,000 to \$2,499,999	1.15	2,320	2,674	1,542,318	0.2
\$2,500,000 to \$4,999,999	1.51	3,370	5,096	3,394,864	0.2
\$5,000,000 to \$7,499,999	1.89	3,370	6,356	5,497,029	0.1
\$7,500,000 to \$9,999,999	2.58	3,370	8,692	7,697,211	0.1
\$10,000,000 to \$14,999,999	4.12	3,370	13,870	12,013,115	0.1
\$15,000,000 to \$19,999,999	4.56	3,370	15,354	14,200,444	0.1

³⁵ See Helen Alexander & Rhys Blakely, *The Triumph of Digital Will Be the Death of Many*

Movies, New Republic (Sep. 12, 2014), available at [http://www.newrepublic.com/article/119431/how-](http://www.newrepublic.com/article/119431/how-digital-cinema-took-over-35mm-film)

[digital-cinema-took-over-35mm-film](http://www.newrepublic.com/article/119431/how-digital-cinema-took-over-35mm-film) (last visited Sept. 12, 2016).

TABLE 24—AVERAGE ANNUAL ONGOING COSTS AS A PERCENTAGE OF ANNUAL REVENUE PER FIRM, BY REVENUE CATEGORY, UNDISCOUNTED—Continued
[2015 \$]

Revenue category	Establishment/ firm	Average ongoing costs per establishment	Average annual ongoing cost per firm	Average revenue per firm	Annual ongoing cost as a percentage of revenue
\$20,000,000 to \$24,999,999	6.00	3,370	20,222	14,314,600	0.1
\$25,000,000 to \$29,999,999	11.00	3,370	37,074	22,734,000	0.2
\$30,000,000 to \$34,999,999	16.50	3,370	55,611	** n/a	** n/a
\$35,000,000 to \$39,999,999	8.00	3,370	26,963	27,514,000	0.1

* Likely firms operating single-auditorium movie theaters that exhibit analog movies exclusively, and therefore not subject to this rulemaking.

** Annual revenue data withheld and value set to 0 to avoid disclosing information of individual businesses.

E. Reporting, Recordkeeping, and Other Compliance Requirements

The final rule imposes no new recordkeeping or reporting requirements. However, the final rule does require that movie theaters disclose to the public information concerning the availability of captioning and audio description for movies shown in their auditoriums. Specifically, § 36.303(g)(8) of the final rule requires movie theaters to inform the public of the availability of captioning and audio description on all notices of movie showings and times at the box office and other ticketing locations, on Web sites and mobile apps, in newspapers, and over the telephone. This requirement applies to any movie theater showing digital movies with captioning and audio description on or after January 17, 2017. Notices of movie showings and times posted by third parties not subject to or under the control of a covered movie theater are not subject to this requirement.

As discussed throughout the Final RA, movie theaters, including small entities, may incur costs as a result of complying with the final rule. These costs are detailed in section 7.4 of the Final RA and section VI.D above but do not include the costs associated with the notice requirement. As discussed in section V.A.3 above, the Department expects that the additional cost and burden of noting which screenings will be captioned or audio-described is de minimis when a movie theater is already preparing a communication listing movie titles and screening times. Therefore, the Department anticipates that the costs and burdens associated with this requirement will also be de minimis for small entities.

Additionally, the Department does not expect that movie theater personnel will need to acquire additional professional skills to comply with this requirement. A specific form of notice is not required. Movie theaters routinely

use “CC” and “AD” or “DV” to indicate the availability of closed movie captioning and audio description in their communications, and the Department’s research indicates that the inclusion of such abbreviations does not require additional technical knowledge. Moreover, the movie exhibition industry has largely moved away from print advertising in favor of digital advertising. As one commenter indicated, digital advertising allows movie theaters to add information concerning the availability of captioning and audio description without much difficulty or cost.

More detailed information on the estimated burden and costs associated with the final rule’s notice requirement is provided in the Department’s 60-day Paperwork Reduction Act Notice published in the **Federal Register** on June 10, 2016. 81 FR 37643. The Department published a second notice in the **Federal Register** on August 30, 2016. 81 FR 59657. The 30-day comment period for the second notice closed on September 29, 2016.

F. Measures Taken To Limit Impact on Small Entities

The Department is aware of potential limitations to compliance for small entities—specifically, small movie theater firms with less than \$38.5 million in annual revenue—and has taken measures to lessen the impact on those entities. In addition to soliciting comments regarding methods to reduce the regulatory impact on small movie theaters, the Department also participated in a roundtable sponsored by the Office of Advocacy of the SBA at which organizations representing small movie theaters as well as individual owners expressed their views. As a result of the information provided, the Department considered a variety of alternatives in the final rule. The different alternatives considered and their relevance to small movie theaters are summarized below. See chapter 6 of

the Final RA for further information and detail regarding the alternatives that the Department considered.

Changes to the Compliance Date

In the final rule, movie theaters have 18 months to acquire and install the necessary equipment to provide closed movie captioning and audio description in their auditoriums exhibiting digital movies. The Department also considered other compliance windows, including a 6-month and a 2-year compliance window. Some commenters suggested that the Department defer the requirements of this rule for small movie theaters with annual revenue less than \$500,000 because these movie theaters might have financial difficulty complying with the requirements.

The Department ultimately decided that an 18-month compliance date was the most appropriate choice for all movie theaters exhibiting digital movies and is only deferring application of the rule’s requirements for movie theater auditoriums that exhibit analog movies exclusively. The Department’s decision regarding the 18-month compliance date in the final rule is based on the Department’s independent research and the information provided in comments during the 2014 NPRM comment period. Based on this information, the Department determined that 6 months may be an insufficient amount of time for movie theaters to comply with the requirements of this rulemaking, especially small movie theaters. However, the Department believes that an 18-month compliance date gives small movie theaters, especially those struggling financially as a result of the unrelated costs of digital conversion, a sufficient amount of time to plan and budget accordingly. Although some commenters suggested a deferral for a category of smaller movie theaters, the Department found that to be unnecessary because movie theaters do not have to comply with requirements of the final rule to the extent that

complying would constitute an undue burden or a fundamental alteration.

Changes to the Scoping Requirements

In the 2014 NPRM, the Department proposed scoping requirements for captioning devices based on the number of seats in a movie theater, which were equivalent to approximately 2 percent of seats. The Department further proposed that movie theaters maintain one audio description device per auditorium, with a minimum of two devices per movie theater. However, in light of the public comments received and proposals made by the movie exhibition industry and multiple disability advocacy groups, those scoping requirements have been reduced in the final rule. Because movie theaters are rarely at 100 percent occupancy, the Department determined that the number of seats within a movie theater is an inappropriate proxy for determining the number of captioning devices required. One commenter noted that the scoping requirements based on seat count could disproportionately impact small movie theaters because many single-auditorium movie theaters are historic establishments with many seats but low occupancy rates. Additionally, usage data indicates that audio description devices are used less frequently than the proposed scoping required. As a result, the Department adopted lower scoping requirements for both captioning and audio description devices based on the number of auditoriums showing digital movies within a movie theater. The reduced scoping in the final rule substantially lowers costs per movie theater and thus reduces burdens on small movie theaters.

Auditoriums Exhibiting Analog Movies Exclusively

The Department considered giving movie theaters with auditoriums equipped to exhibit analog movies exclusively 4 years to comply with the rule's requirements, as opposed to deferring the decision whether to engage in rulemaking with respect to such auditoriums (see section 1.4.1 and section 6.3 of the Final RA). Based on public comments and analysis of the most current data, the Department ultimately decided to defer analog auditoriums from coverage of this rule. As previously discussed, the movie industry continues to undergo significant changes in the production and distribution of movies, resulting in the near elimination of first-run movies in analog film format. Most movie theaters have converted to digital projection systems to the extent that they are financially able to do so, and

as a result, small theaters that still have analog projection systems tend to have fewer financial resources than other movie theaters. The Department rejected the alternative 4-year compliance date for analog movie theaters and is deferring until a later date the decision whether to apply the rule's requirements to movie theater auditoriums exhibiting analog movies exclusively. Because the remaining analog movie theaters likely qualify as small entities, the deferral of rulemaking with respect to analog auditoriums will reduce the burdens on small movie theaters.

List of Subjects for 28 CFR Part 36

Administrative practice and procedure, Buildings and facilities, Business and industry, Civil rights, Individuals with disabilities, Penalties, Reporting and recordkeeping requirements.

By the authority vested in me as Attorney General by law, including 28 U.S.C. 509 and 510, 5 U.S.C. 301, and 42 U.S.C. 12186 and 12205a, and for the reasons set forth in Appendix A to 28 CFR part 36, chapter I of title 28 of the Code of Federal Regulations is amended as follows:

PART 36—NONDISCRIMINATION ON THE BASIS OF DISABILITY BY PUBLIC ACCOMMODATIONS AND IN COMMERCIAL FACILITIES

- 1. The authority citation for part 36 is revised to read as follows:

Authority: 5 U.S.C. 301; 28 U.S.C. 509, 510; 42 U.S.C. 12186(b), 12205a.

Subpart A—General

- 2. In § 36.303:
a. Redesignate paragraph (g) as paragraph (h); and
b. Add new paragraph (g) to read as follows:

§ 36.303 Auxiliary aids and services.

* * * * *

(g) Movie theater captioning and audio description—(1) Definitions. For the purposes of this paragraph (g)—

- (i) Analog movie means a movie exhibited in analog film format.
(ii) Audio description means the spoken narration of a movie's key visual elements, such as the action, settings, facial expressions, costumes, and scene changes. Audio description generally requires the use of an audio description device for delivery to a patron.
(iii) Audio description device means the individual device that a patron may use at any seat to hear audio description.

(iv) Captioning device means the individual device that a patron may use at any seat to view closed movie captioning.

(v) Closed movie captioning means the written display of a movie's dialogue and non-speech information, such as music, the identity of the character who is speaking, and other sounds or sound effects. Closed movie captioning generally requires the use of a captioning device for delivery of the captions to the patron.

(vi) Digital movie means a movie exhibited in digital cinema format.

(vii) Movie theater means a facility, other than a drive-in theater, that is owned, leased by, leased to, or operated by a public accommodation and that contains one or more auditoriums that are used primarily for the purpose of showing movies to the public for a fee.

(viii) Open movie captioning means the written on-screen display of a movie's dialogue and non-speech information, such as music, the identity of the character who is speaking, and other sounds and sound effects.

(2) General. A public accommodation shall ensure that its movie theater auditoriums provide closed movie captioning and audio description whenever they exhibit a digital movie that is distributed with such features. Application of the requirements of paragraph (g) of this section is deferred for any movie theater auditorium that exhibits analog movies exclusively, but may be addressed in a future rulemaking.

(3) Minimum requirements for captioning devices. A public accommodation shall provide a minimum number of fully operational captioning devices at its movie theaters in accordance with the following Table:

Table with 2 columns: Number of movie theater auditoriums exhibiting digital movies, Minimum required number of captioning devices. Rows: 1 (4), 2-7 (6), 8-15 (8), 16+ (12)

(4) Minimum requirements for audio description devices. (i) A public accommodation shall provide at its movie theaters a minimum of one fully operational audio description device for every two movie theater auditoriums exhibiting digital movies and no less than two devices per movie theater. When calculation of the required number of devices results in a fraction, the next greater whole number of devices shall be provided.

(ii) A public accommodation may comply with the requirements in paragraph (g)(4)(i) of this section by using the existing assistive listening receivers that the public accommodation is already required to provide at its movie theaters in accordance with Table 219.3 of the 2010 Standards, if those receivers have a minimum of two channels available for sound transmission to patrons.

(5) *Performance requirements for captioning devices and audio description devices.* Each captioning device and each audio description device must be properly maintained by the movie theater to ensure that each device is fully operational, available to patrons in a timely manner, and easily usable by patrons. Captioning devices must be adjustable so that the captions can be viewed as if they are on or near the movie screen, and must provide clear, sharp images in order to ensure readability of captions.

(6) *Alternative technologies.* (i) A public accommodation may meet its obligation to provide captioning and audio description in its movie theaters to persons with disabilities through any technology so long as that technology provides communication as effective as that provided to movie patrons without disabilities.

(ii) A public accommodation may use open movie captioning as an alternative to complying with the requirements specified in paragraph (g)(3) of this section, either by providing open movie captioning at all showings of all movies available with captioning, or whenever requested by or for an individual who is deaf or hard of hearing prior to the start of the movie.

(7) *Compliance date for providing captioning and audio description.* (i) A public accommodation must comply with the requirements in paragraphs (g)(2)–(6) of this section in its movie theaters that exhibit digital movies by June 2, 2018.

(ii) If a public accommodation converts a movie theater auditorium from an analog projection system to a system that allows it to exhibit digital movies after December 2, 2016, then that auditorium must comply with the requirements in paragraph (g) of this section by December 2, 2018, or within 6 months of that auditorium's complete installation of a digital projection system, whichever is later.

(8) *Notice.* On or after January 17, 2017, whenever a public accommodation provides captioning and audio description in a movie theater auditorium exhibiting digital movies, it shall ensure that all notices of movie showings and times at the box office

and other ticketing locations, on Web sites and mobile apps, in newspapers, and over the telephone, inform potential patrons of the movies or showings that are available with captioning and audio description. This paragraph does not impose any obligation on third parties that provide information about movie theater showings and times, so long as the third party is not part of or subject to the control of the public accommodation.

(9) *Operational requirements.* On or after January 17, 2017, whenever a public accommodation provides captioning and audio description in a movie theater auditorium exhibiting digital movies, it shall ensure that at least one employee is available at the movie theater to assist patrons seeking or using captioning or audio description whenever a digital movie is exhibited with these features. Such assistance includes the ability to—

(i) Locate all necessary equipment that is stored and quickly activate the equipment and any other ancillary systems required for the use of the captioning devices and audio description devices;

(ii) Operate and address problems with all captioning and audio description equipment prior to and during the movie;

(iii) Turn on open movie captions if the movie theater is relying on open movie captioning to meet the requirements of paragraph (g)(3) of this section; and

(iv) Communicate effectively with individuals with disabilities, including those who are deaf or hard of hearing or who are blind or have low vision, about how to use, operate, and resolve problems with captioning devices and audio description devices.

(10) This section does not require the use of open movie captioning as a means of compliance with paragraph (g) of this section, even if providing closed movie captioning for digital movies would be an undue burden.

■ 3. Appendix F to part 36 is added to read as follows:

Appendix F to Part 36—Guidance and Section-by-Section Analysis

Section 36.303(g)(1) Definitions

In the Notice of Proposed Rulemaking, 79 FR 44976 (Aug. 1, 2014) (NPRM), the Department proposed § 36.303(g)(1), which set forth definitions for certain terms specifically referenced in paragraph (g). The Department sought public comment on these proposed definitions.

“Analog Movie”

Although the Department did not specifically propose a definition of “analog

movie” in the NPRM, the Department defined the term in the preamble and solicited comment on the state of analog movies and their availability. In the final rule, the Department has added a definition of “analog movie” in order to distinguish between movies shown in digital cinema format and movies shown in analog format. “Analog movie” is defined to mean “a movie exhibited in analog film format.”

“Audio Description”

In the NPRM, the Department used the term “audio description” to refer to the spoken description of information describing the visual elements of a movie to an individual who is blind or has low vision and who is unable to see the images and action on the screen. Proposed § 36.303(g)(1)(i) defined “audio description” as the “provision of a spoken narration of key visual elements of a visually delivered medium, including, but not limited to, actions, settings, facial expressions, costumes, and scene changes.” Although the Department believes that the term “audio description” is most commonly used to describe this service, it sought public comment on whether to use this or some other nomenclature.

All commenters addressing this issue agreed with the Department's proposal and supported the use of the term and the Department's definition. In the final rule, the Department has retained the term “audio description,” and has slightly modified the definition for clarity to read as follows: “*Audio description* means the spoken narration of a movie's key visual elements, such as the action, settings, facial expressions, costumes, and scene changes. *Audio description* generally requires the use of an audio description device for delivery to a patron.”

“Audio Description Device”

In the NPRM, at proposed § 36.303(g)(1)(iii), the Department used the term “individual audio description listening device” to refer to the “individual device that patrons may use at their seats to hear audio description.” The sole commenter on this definition expressed concern that the term “individual audio description listening device” was unnecessarily long. The Department agrees with the commenter and has revised the name of the device accordingly in the final rule. The final rule retains the text of the proposed definition with minor edits.

“Captioning Device”

In the NPRM, at proposed § 36.303(g)(1)(iv), the Department used the term “individual captioning device” to refer to the “individual device that patrons may use at their seats to view the closed captions.” The sole commenter on this definition recommended that the Department shorten the nomenclature for this device to “captioning device.” The Department agrees with the commenter and has revised the name of the device accordingly in the final rule. The final rule retains the text of the proposed definition with minor edits.

“Closed Movie Captioning”

The NPRM defined “closed movie captioning” as “the written text of the movie dialogue and other sounds or sound making (e.g. sound effects, music, and the character who is speaking).” The NPRM further provided that closed movie captioning be available only to individuals who request it, and that, generally, it requires the use of an individual captioning device to deliver the captions to the patron.

Commenters were equally split as to whether the Department should use “closed movie captioning” or some other language to refer to the technology. Some commenters urged the Department to use the term “closed captioning.” Other commenters disagreed, however, and stated that the Department should avoid using the term “closed captioning” to distinguish it from the “closed captioning” that is turned on at home by a person viewing the television. In the final rule, the Department is retaining the term “closed movie captioning,” but the definition is modified for clarity to read: “*Closed movie captioning* means the written display of a movie’s dialogue and non-speech information, such as music, the identity of the character who is speaking, and other sounds or sound effects. *Closed movie captioning* generally requires the use of a captioning device for delivery of the captions to the patron.”

“Digital Movie”

The Department has added a definition of “digital movie,” meaning “a movie exhibited in digital cinema format.”

“Movie Theater”

The NPRM proposed defining “movie theater” as “a facility other than a drive-in theater that is used primarily for the purpose of showing movies to the public for a fee” in order to make clear which facilities are subject to the specific captioning and audio description requirements set forth in § 36.303(g). The Department intended this definition to exclude drive-in movie theaters as well as facilities that screen movies if the facility is not used primarily for the purpose of showing movies for a fee, such as museums, hotels, resorts, or cruise ships, even if they charge an additional fee. The Department asked for public comment on the proposed definition and whether it adequately described the movie theaters that should be covered by this regulation.

Commenters generally supported the Department’s proposed definition for “movie theater,” but there were some concerns about the proposed definition’s scope. Some commenters asserted that the definition of “movie theater” should be expanded to include the institutions that the Department expressly excluded, such as museums, hotels, resorts, cruise ships, amusement parks, and other similar public accommodations that show movies as a secondary function, whether or not they charge a fee. One commenter expressed concern that such entities might believe that they are otherwise exempt from any requirement to furnish auxiliary aids and services to ensure effective communication, and another commenter urged the

Department to consider developing additional regulations that would specifically address public accommodations that are not covered by the proposed definition but otherwise exhibit movies or other video content.

The Department declines to make any changes at this time to address public accommodations that do not meet the definition of “movie theater” and are, therefore, not subject to the requirements of paragraph (g). The Department’s title III regulation has always made clear that all public accommodations must provide effective communication to the public through the provision of auxiliary aids and services, including, where appropriate, captioning and audio description. *See generally* 28 CFR 36.303; 28 CFR part 36, app. A. The requirements of this rule were not intended to supplant the general obligation to provide effective communication through the provision of auxiliary aids and services. They are only intended to provide clarity about how “movie theaters” must meet this obligation. The Department notes that many public accommodations that screen movies as a secondary function already provide appropriate auxiliary aids and services, and where the Department has identified the need for enforcement action, these types of public accommodations have been willing to comply with the ADA and the effective communication requirement. *See, e.g.,* Press Release, U.S. Department of Justice, *Justice Department Reaches Settlement with National Museum of Crime and Punishment to Improve Access for People with Disabilities* (Jan. 13, 2015), available at <http://www.justice.gov/opa/pr/justice-department-reaches-settlement-national-museum-crime-and-punishment-improve-access> (last visited Sept. 12, 2016).

Two commenters asked the Department to revise the definition of “movie theater” to clarify that public accommodations used as temporary screening locations during film festivals, such as pop-up tents, convention centers, and museums with theaters, are not subject to the requirements of paragraph (g). According to such commenters, most movies screened at festivals are not ready for distribution, and typically have not yet been distributed with captioning and audio description. To the extent a film is already distributed with these features, the commenters argued that the myriad of logistics entailed in coordinating a festival may preclude a film festival from making such features available.

The Department does not believe that its definition of “movie theater” encompasses the temporary facilities described by the commenters that host film festivals. However, operators of film festivals, just like any other public accommodation that operates a place of entertainment, are still subject to the longstanding general requirement under § 36.303 to provide effective communication unless doing so would be a fundamental alteration of the program or service or would constitute an undue burden. Moreover, if a festival programmer schedules the screening of a movie that is already distributed with

captioning and audio description at a movie theater that is subject to the requirements in paragraph (g), then the effective communication obligation would require the festival to ensure that the accessible features are available at all scheduled screenings of a movie distributed with such features.

The Department also received several comments regarding the exclusion of drive-in movie theaters in the proposed definition. Many commenters agreed that drive-in movie theaters should not be subject to the requirements of paragraph (g) because the technology still does not exist to exhibit movies with closed movie captioning and audio description in this setting. A few commenters pointed out innovative ways for drive-in movie theaters to provide captioning and audio description and argued that such options are feasible. For example, one commenter suggested that drive-in movie theaters provide audio description through a second low-power FM broadcast transmitter or on a second FM channel. However, these commenters did not clearly identify technology that is currently available or under development to provide closed movie captioning in this setting. Finally, one commenter expressed concern that if audio description was broadcast at a drive-in theater, it would likely be heard by patrons who do not require audio description and would result in a fundamental alteration of the movie-going experience for such patrons.

The Department declines to change its position that drive-in movie theaters should be excluded from the requirements of paragraph (g). Given the diminishing number of drive-in movie theaters, the current lack of accessible technology to provide closed movie captioning and audio description in this setting, and the fact that it is unlikely that such technology will be developed in the future, the Department remains convinced that rulemaking regarding drive-in movie theaters should be deferred until the necessary technology becomes commercially available.

For the reasons discussed above, the Department has retained the text of the proposed definition of “movie theater” with minor edits. The final rule defines “movie theater” as “a facility, other than a drive-in theater, that is owned, leased by, leased to, or operated by a public accommodation and that contains one or more auditoriums that are used primarily for the purpose of showing movies to the public for a fee.”

“Open Movie Captioning”

The NPRM proposed defining “open movie captioning” as “the provision of the written text of the movie dialogue and other sounds or sound making in an on-screen text format that is seen by everyone in the movie theater.”

While commenters were evenly split on whether the new regulation should use the term “open movie captioning” or “open captioning,” the Department chose the former to avoid confusion and emphasize that the term refers only to captioning provided at movie theaters. The final rule defines “open movie captioning” as “the written on-screen display of a movie’s dialogue and non-speech information, such

as music, the identity of the character who is speaking, and other sounds and sound effects.”

Section 36.303(g)(2) General

In the NPRM, the Department proposed at § 36.303(g)(2)(i) that “[a] public accommodation that owns, leases, leases to, or operates a movie theater shall ensure that its auditoriums have the capability to exhibit movies with closed movie captions.” That paragraph further provided that in all cases where the movies the theater intends to exhibit are produced, distributed, or otherwise made available with closed movie captions, the public accommodation must ensure that it acquires the captioned version of those movies and makes closed movie captions available at all scheduled screenings of those movies. An identical provision requiring movie theaters to exhibit movies with audio description was proposed at § 36.303(g)(3)(i). The Department proposed applying the requirements for closed movie captioning and audio description to all movie screens (auditoriums) in movie theaters that show digital movies and sought public comment as to the best approach to take with respect to movie theaters that show analog movies. The Department sought public comment on whether it should adopt one of two options regarding the specific obligation to provide captioning and audio description at movie theater auditoriums that display analog movies. Option 1 proposed covering movie theater screens (auditoriums) that display analog movies but giving them 4 years to come into compliance with the requirements of § 36.303(g). Option 2 proposed deferring the decision whether to apply the rule’s requirements to movie theater screens (auditoriums) showing analog movies and considering additional rulemaking at a later date.

Many commenters generally agreed with the provisions as they related to movie theaters displaying digital movies. These commenters stressed, however, that movie theaters should in no way be prohibited or limited from exhibiting a movie that is not available with captioning or audio description, or be required to add captioning and audio description when these features are not available.

Commenters were split in response to the Department’s question concerning the best approach to take with respect to analog movie theaters. A slight majority of commenters supported deferral for movie theater auditoriums that exhibit analog movies exclusively. In support of Option 2, these commenters pointed to the state of the movie industry, the financial condition of many small movie theaters, and the unintended consequences of a 4-year compliance date. According to the comments, there are very few remaining movie theaters that display analog movies exclusively, and despite the industry’s urging that such movie theaters must convert to digital to remain viable, many of these movie theaters have not converted because they cannot afford the high cost to do so. Therefore, these commenters argued that a regulation covering analog movie theaters will have minimal overall impact in addition

to being an unnecessary strain on small businesses, considering the high cost of compliance for such movie theaters.

The remaining commenters responding to this question stated that the Department should adopt Option 1’s 4-year compliance date for movie theaters displaying analog movies. These commenters reasoned that fairness and equality concerns justified adoption of Option 1 because, in their view, Option 2 could incentivize more movie theaters to delay their digital conversion, resulting in fewer movie theaters being subject to the regulation, and individuals with hearing and vision disabilities continuing to face unequal access to movie theaters. A few disability groups argued that because a movie theater is subject to title III of the ADA regardless of whether it displays analog movies or digital movies, adoption of Option 2 could be seen as carving out an exception within the ADA where none exists otherwise.

In consideration of these comments and the Department’s independent research, the Department has decided to defer until a later date the decision whether to engage in rulemaking with respect to movie theater auditoriums that exhibit analog movies exclusively. Thus, the final rule makes clear that the requirements of paragraph (g) apply only to movie theaters with auditoriums that show digital movies. The Department agrees with commenters that very few analog movie theaters remain, and that the number of such movie theaters has declined rapidly in recent years. The Department believes that it is prudent to wait until it is clear whether there will be any movie theaters that continue to show analog movies and whether analog movies will continue to be produced at all, or distributed with captioning and audio description. Although movie theater auditoriums that exhibit analog movies exclusively are not subject to the specific requirements of paragraph (g) at this time, such movie theaters are nonetheless public accommodations and subject to the effective communication requirements of title III.

The final rule provides that “[a] public accommodation shall ensure that its movie theater auditoriums provide closed movie captioning and audio description whenever they exhibit a digital movie that is distributed with such features. Application of the requirements of paragraph (g) is deferred for any movie theater auditorium that exhibits analog movies exclusively, but may be addressed in a future rulemaking.”

The requirements of paragraph (g) do not in any way prohibit a movie theater from displaying a movie that has not been made available with captioning and audio description features nor do the requirements require a movie theater to independently add such features to a movie that is not distributed with such features. In addition, all movie theaters, regardless of size, status of conversion to digital cinema, or economic viability, continue to have available to them the individualized and fact-specific undue burden limitation specified in § 36.303(a). This regulation does not change the availability of this compliance limitation nor the circumstances under which it can be asserted. *See* 28 CFR 36.104 (defining undue

burden and listing factors to be considered in determining whether an action would result in an undue burden). It does, however, provide clarity about how movie theaters can meet their longstanding effective communication obligations under the ADA.

The Department notes that even if a movie theater cannot initially install captioning and audio description equipment in all of its auditoriums because it is an undue burden, the movie theater is still obligated to comply with renumbered § 36.303(h) and provide alternatives to full compliance by providing captioning and audio description in some of its auditoriums up to the point where the cost becomes an undue burden. In such a situation, the movie theater should take steps to maximize the range of movie options for customers who are deaf or hard of hearing, or blind or have low vision, by dispersing the available equipment throughout their auditoriums so that the theater is able to exhibit as many movies as possible with captioning and audio description throughout the day and evening on weekdays and weekends. If, for example, a six-auditorium movie theater can only afford to install captioning equipment in half of its auditoriums, and it has auditoriums with different capacities, it should install captioning equipment in a large, a medium, and a small auditorium. This distribution of equipment would permit exhibition of different types of movies, as blockbusters generally are shown in larger auditoriums first and lower budget or older movies may only be shown in medium or small auditoriums.

It has been, and continues to be, the Department’s position that it would not be a fundamental alteration of the business of showing movies in theaters to exhibit movies already distributed with closed movie captioning and audio description in order to ensure effective communication for individuals who are deaf or hard of hearing, or blind or have low vision. The service that movie theaters provide is the screening or exhibiting of movies. The use of captioning and audio description to make that service available to those who are deaf or hard of hearing, or blind or have low vision, does not change that service. Rather, the provision of such auxiliary aids is the means by which these individuals gain access to movie theaters’ services and thereby achieve the “full and equal enjoyment,” 42 U.S.C. 12182(a), of the screening of movies. *See, e.g.,* Brief for the United States as Amicus Curiae Supporting Appellants and Urging Reversal at 15–17, *Arizona ex rel. Goddard v. Harkins Amusement Enters., Inc.*, 603 F.3d 666 (9th Cir. 2010) (No. 08–16075); *see also* NPRM, 79 FR 44976, 44982–83 (Aug. 1, 2014). The Department received no public comments challenging that position.

Section 36.303(g)(3) Minimum Requirements for Captioning Devices

In the NPRM, the Department proposed that movie theaters be required to have available a minimum number of captioning devices equal to approximately half the number of assistive listening receivers already mandated for assembly areas by sections 219 and 706 of the 2010 Standards.

The calculation was based on a movie theater's total seating capacity and 2010 Census data estimating that 3.1 percent of the U.S. population ages 15 and older (7.6 million) has difficulty hearing. See U.S. Census Bureau, U.S. Department of Commerce, P70-131, *Americans with Disabilities: 2010 Household Economic*

Studies at 8 (2012), available at <http://www.census.gov/prod/2012pubs/p70-131.pdf> (last visited Sept. 12, 2016). Thus, the proposed § 36.303(g)(2)(iii)(A) required that a movie theater maintain captioning devices for approximately 2–4 percent of all available seats and stated that: “a public accommodation that owns, leases, leases to,

or operates a movie theater shall provide individual captioning devices in accordance with the following Table [below]. This requirement does not apply to movie theaters that elect to exhibit all movies at all times at that facility with open movie captioning.”

Capacity of seating in movie theater	Minimum required number of individual captioning devices
100 or less	2.
101 to 200	2 plus 1 per 50 seats over 100 seats or a fraction thereof.
201 to 500	4 plus 1 per 50 seats over 200 seats or a fraction thereof.
501 to 1000	10 plus 1 per 75 seats over 500 seats or a fraction thereof.
1001 to 2000	18 plus 1 per 100 seats over 1000 seats or a fraction thereof.
2001 and over	28 plus 1 per 200 seats over 2000 seats or a fraction thereof.

The Department received more than 70 comments on its proposed scoping requirements for captioning devices. All commenters disagreed with the formula in the NPRM, and with the exception of a very few individuals and a law school clinic, commenters uniformly maintained that the Department's proposed requirements substantially overestimated the number of captioning devices necessary for a variety of reasons.

Many commenters asserted that seating capacity does not equate with the need for captioning devices because movie theaters are rarely at 100 percent seat occupancy, and not all Americans attend the movies simultaneously. They stressed that even at peak attendance times (weekends), average seat occupancy rates are substantially less than half of capacity while small movie theaters in rural areas with one or two auditoriums report even lower attendance rates. Other commenters noted that old historic theaters often have large seating capacities, despite low attendance rates. And some noted that at large, multi-auditorium complexes, not all auditoriums are simultaneously in use at all times. Thus, these commenters asserted that average movie attendance during weekend hours, not the number of theater seats, most accurately predicts anticipated demand for captioning devices.

Some commenters maintained that the Department's proposed scoping requirements significantly overestimated the need for captioning devices because the percentage of persons in the population who have difficulty hearing does not reflect those who will actually benefit from or use the devices. In their view, captioning devices will not be used by the vast majority of individuals who are deaf or hard of hearing because such devices are only needed by persons who have “severe” difficulty hearing, and assistive listening receivers, which amplify the volume of sound, are already required and available at movie theaters. These commenters also cited statistics showing that a significant percentage of Americans do not attend the movies at least once a year, and while hearing loss disproportionately affects seniors, they represent a smaller proportion of persons who actually attend the movies.

Commenters also stressed that in their experience, the Department's proposed scoping requirements for captioning devices

far exceed demand in those movie theaters that currently stock and advertise the availability of such devices. To support this conclusion, NATO offered device usage data from five movie theater companies (which included a small business with a total screen (auditorium) count in the 1–75 range, three regional companies with a total screen (auditorium) count in the 300–700 range, and a national company with a 2000+ screen (auditorium) count) that stock and advertise the availability of captioning devices on their Web sites, at ticket counters, and on third-party Web sites. According to NATO, that data showed that even though four of these five companies stocked far fewer captioning devices than the NPRM proposed, actual demand rarely, if ever, exceeded supply even at peak attendance times. Other movie theaters and a trade association also submitted tracking records to confirm the same.

Several commenters objected to the Department's proposed scoping requirements because they provided a fixed, nonadjustable number that was not tied to actual consumer demand and failed to account for variations in attendance based on theater location and patron demographics. These commenters noted that while movie theaters near areas with a high concentration of residents or students who are deaf or hard of hearing may experience greatest demand for devices, a movie theater in a small rural area may have only a few requests. Many commenters also expressed concern that because the Department's proposed scoping requirements would result in the vast majority of movie theaters having to purchase expensive technology far in excess of what is needed or would be used, those movie theaters would likely avoid investing in new, superior technology as it becomes available.

Although commenters overwhelmingly disagreed with the Department's proposed approach to scoping, most did not suggest a formula for determining the number of captioning devices that should be required. Instead, they recommended that the number of required devices be based on one or more factors, including actual or average weekend movie attendance, percentage of individuals who have severe hearing difficulty and will likely use the devices, demand for devices, number of movie theater seats, screen count, and patron demographics. For example, a Federal agency recommended that the

Department set scoping requirements in accordance with the optimal number of devices sufficient to provide accessibility to the disability community (based on relevant factors such as device usage, demand, and weekend theater attendance) while minimizing the burden on small businesses. A few movie theaters maintained that any minimum device requirement would be a waste of resources and unnecessary because movie theaters seek to satisfy their patrons' needs, and as a result, many already advertise and provide captioning devices upon request.

NATO and four advocacy groups representing persons who are deaf or hard of hearing¹ submitted a Joint Comment offering a three-tiered approach to scoping that was referenced and supported by many commenters. First, the Joint Comment recommended that movie theaters obtain a minimum number of captioning devices based on the number of screens (auditoriums) displaying digital movies, in accordance with the following:

- Single Screen: 4 devices
- Miniplex (2–7 screens): 6 devices
- Multiplex (8–15 screens): 8 devices
- Megaplex (16+ screens): 12 devices

Second, in order to address the limited circumstances when demand for captioning devices exceeds minimum requirements, the Joint Comment proposed that movie theaters record weekend demand for captioning devices and adjust the number of devices biannually to be equal to 150 percent of the average weekend demand during a 6-month tracking period. For example, under this formula, a movie theater that is initially required to have 6 devices and calculates an average actual weekend demand of 8 devices during a tracking period must increase the number of available devices to 12 (150 percent of 8). Finally, the Joint Comment recommended that the Department require every movie theater company to submit an annual report of its tracking records to the Department.

After considering all comments, census data, statistics regarding movie theater attendance, actual usage data, and its

¹ Those advocacy groups are the National Association of the Deaf, the Hearing Loss Association of America, the Association of Late Deafened Adults, and the Alexander Graham Bell Association for the Deaf and Hard of Hearing.

independent research, the Department has modified its approach to captioning device scoping and has adopted a final rule that requires movie theaters to have on hand the minimum number of captioning devices proposed in the Joint Comment. Thus, the final rule at renumbered § 36.303(g)(3)(i) states that “[a] public accommodation shall provide a minimum number of fully operational captioning devices at its movie theaters in accordance with the following Table:”

Number of movie theater auditoriums exhibiting digital movies	Minimum required number of captioning devices
1	4
2–7	6
8–15	8
16+	12

The Department imposes these requirements because its own research and analysis confirms that they will easily satisfy maximum weekend demand for captioning devices at movie theaters across the nation in almost every location. Thus, the Department believes that the final rule obligates movie theaters to provide the optimum number of captioning devices sufficient to provide accessibility to individuals with disabilities who will need and use them, without requiring movie theaters to purchase equipment that may likely never be used.

Despite NATO’s and a number of other comments to the contrary, the Department has also decided not to impose specific requirements at this time for providing additional captioning devices when actual demand for them exceeds the rule’s minimum requirements. While the Department acknowledges that there are a few movie theaters located in areas where there is an unusually high concentration of individuals who are deaf or hard of hearing, comments, usage data, and independent research all indicate that only in those rare circumstances is there a reasonable possibility that regular demand for devices may exceed the rule’s minimum requirements. That same information also reflects that many movie theaters located in markets that consistently have an unusually large number of patrons with hearing difficulties are already making voluntary efforts to satisfy consumer demand. For example, because open movie captioning is popular with many movie patrons who are deaf or hard of hearing, some movie theaters near schools that educate persons who are deaf provide open-captioned screenings on-demand, or in accordance with a convenient, regular, and frequent schedule. In any event, the Department currently lacks adequate information and data to craft an appropriate standard to address these situations.

In addition, the Department decided not to impose a recordkeeping requirement on movie theaters at this time, even though some commenters suggested that the Department do so in order to require movie theaters to keep records of actual demand for devices. The NPRM did not solicit information about existing movie theater

recordkeeping practices with respect to the provision of assistive listening receivers or captioning and audio description devices, and the Department lacks adequate data as to the costs and the burdens of imposing such a requirement on all movie theaters. Moreover, the Department has not previously imposed this type of recordkeeping requirement on public accommodations, and it declines to do so without more information about the need and the costs. The Department intends, however, to reach out to stakeholders in the future and obtain additional information about whether it should consider engaging in supplemental rulemaking regarding a recordkeeping requirement and imposing a standard that addresses situations when actual demand exceeds the rule’s minimum requirements.

In the interim, for those movie theaters that are located in the few places where there is an unusually high concentration of individuals who are deaf or hard of hearing, the Department strongly encourages these public accommodations to voluntarily work with the local disability community to identify and maintain an appropriate number of captioning devices, or to utilize other approaches, including open movie captioning, to satisfy their patrons’ regular and actual demand.

Section 36.303(g)(4) Minimum Requirements for Audio Description Devices

In order to ensure that individuals who are blind or have low vision have access to audio-described movies when such movies are available, movie theaters must provide a reasonable number of audio description devices. In the NPRM, the Department proposed at § 36.303(g)(3)(ii)(A) that movie theaters maintain one audio description device per auditorium, with a minimum of two devices per movie theater. However, the Department noted at proposed § 36.303(g)(3)(ii)(B) that “[a] movie theater may comply with this requirement by using receivers it already has available as assistive listening devices in accordance with the requirements in Table 219.3 of the 2010 Standards, if those receivers have a minimum of two channels available for sound transmission to patrons.” The Department theorized that many movie theaters utilized the newer, multi-channel assistive listening receivers, and as a result, most movie theaters would not be required to purchase additional devices in order to comply with this requirement.

The Department received extensive comments regarding the proposed scoping for audio description devices. Although commenters overwhelmingly supported the proposed rule’s goal of ensuring access to audio description in movie theaters, only three commenters agreed with the proposed scoping.

Several commenters recommended a greater number of audio description devices than the Department proposed in the NPRM to accommodate an increase in the number of individuals who are blind or have low vision who will likely attend the movies if accessible technologies are available. A few commenters recommended two audio description devices per auditorium, citing a

movie theater’s usage data to support the suggestion. One commenter, concerned that a movie theater should be able to accommodate a larger group of blind or visually impaired movie patrons, recommended at least eight audio description devices per movie theater, or two devices per auditorium, whichever is greater. Finally, one commenter proposed requiring three audio description devices per auditorium to accommodate a larger user pool, and to counteract a reduction in available devices that may arise in the event of equipment failure, or when devices are being recharged.

The majority of commenters, however, stated that the recommended scoping was excessive and too inflexible. These commenters reasoned that the proposed scoping failed to consider attendance variability or demographics, and inhibited movie theaters from moving devices between locations to effectively meet demographic needs. Commenters recommended basing the number of required audio description devices on factors such as weekend attendance, annual attendance, tracked usage rates, and market demand. The Department received a large number of comments from movie theaters stating that current requests by patrons for audio description devices are extremely low. Additionally, a trade association submitted comments stating that member companies reported signing out a maximum of 1–4 audio description devices at any time, and that these companies never had more requests for devices than the number of devices available. Based on this information, the trade association recommended that the Department require one audio description device for every two auditoriums, with a minimum of two devices per movie theater.

In addition to comments criticizing the proposed scoping, commenters also addressed the Department’s belief that most movie theaters utilize multi-channel headsets to meet their assistive listening device obligations. A couple of movie theaters indicated that they have the dual-channel receivers. However, a trade association commented that many movie theaters still rely on single-channel headsets to meet their assistive listening device obligations and that the Department erred in assuming that most movie theaters would not need to buy additional devices in order to comply with these scoping requirements.

In consideration of the comments received and the Department’s independent research, the Department has adjusted the required number of audio description devices to one device for every two auditoriums. The Department believes that the available data supports its view that the revised scoping ensures that movie theaters will have available an adequate number of devices without requiring movie theaters to purchase more equipment than is likely necessary. The final rule at renumbered § 36.303(g)(4)(i) reads as follows: “A public accommodation shall provide at its movie theaters a minimum of one fully operational audio description device for every two movie theater auditoriums exhibiting digital movies and no less than two devices per movie theater. When calculation of the required

number of devices results in a fraction, the next greater whole number of devices shall be provided.” The Department has retained the provision in proposed § 36.303(g)(3)(ii)(B) regarding the use of multi-channel assistive listening receivers to meet this requirement. The Department notes that if movie theaters are purchasing new receivers to replace existing single-channel receivers, they may choose to purchase two-channel receivers and then use them to meet both their requirements to provide assistive listening receivers and audio description devices if use of the two-channel receivers is compatible with their audio description and assistive listening systems. The Department does not, however, intend this provision to discourage movie theaters from using induction loop systems for sound amplification while using a different system for transmission of audio description. Renumbered § 36.303(g)(4)(ii) states that “[a] public accommodation may comply with the requirements in paragraph (g)(4)(i) by using the existing assistive listening receivers that the public accommodation is already required to provide at its movie theaters in accordance with Table 219.3 of the 2010 Standards, if those receivers have a minimum of two channels available for sound transmission to patrons.”

Section 36.303(g)(5) Performance Requirements for Captioning Devices and Audio Description Devices

In the NPRM, the Department proposed performance requirements for the individual devices used by movie patrons at their individual seats. Proposed § 36.303(g)(2)(iii)(B) stated that the individual devices needed to be adjustable; be available to patrons in a timely manner; provide clear, sharp images; be properly maintained; and be easily usable by the patron in order to ensure effective communication.

While the comments were generally supportive of the existence of performance requirements, there were differences of opinion expressed about the specifics of this provision. Some commenters supported the Department’s language, but others expressed concern that the requirements as written were vague and subjective. For example, a few commenters proposed that the Department define specific quantifiable and technical standards, and several commenters suggested that the Department develop a program to encourage the development of better accessibility technology due to their concerns associated with the design and quality of current technology.

The Department also received conflicting comments with respect to adding requirements beyond those proposed in the NPRM. Several commenters suggested that the Department require captioning devices to have an adjustable font size while many disagreed, stating that an adjustable font size requirement would be problematic. Other commenters believed that the Department should require that all devices be clean, in addition to being available and functional. Commenters also suggested requiring quality assurance procedures, frequent testing, and regular maintenance schedules to ensure that

the devices are functional and deliver complete and accurate captions and audio description. One commenter encouraged the Department to require that movie theaters maintain the most recent technology in a range of device styles and consult with customers and consumer groups to decide which devices to purchase. Although the NPRM language focused on captioning devices, many of the comments urged the Department to ensure that both captioning and audio description devices are maintained and readily available.

After considering all comments, the Department has decided to retain the performance requirements as proposed in the NPRM with minor structural edits and to make clear that the requirements for maintenance and timely availability apply to both types of devices. The Department declines to impose any additional requirements related to ensuring the functionality of the captioning and audio description devices provided by movie theaters. The rule imposes the responsibility on movie theaters to ensure that the equipment is fully operational (meets all of the performance requirements in the regulation) and available. The Department believes that movie theaters are able to determine the best approach for ensuring compliance with the regulatory requirements and notes that § 36.211(b) (Maintenance of accessible features) “does not prohibit isolated or temporary interruptions in service or access due to maintenance or repairs.”

The Department also declines to include specific technical specifications regarding the captioning and audio description devices. The Department notes that its approach to performance requirements for captioning and audio description devices is similar to the approach the Department took with respect to performance standards for video remote interpreting services. *See* § 36.303(f).

The Department also declines to impose an obligation that movie theaters must upgrade to the most recent technology. While the Department is in favor of technological development, such a requirement is beyond the scope of this regulation. Additionally, the Department believes that many of the concerns about current devices raised by commenters (e.g., poor power connection or poor signal) are adequately addressed by the requirements in paragraphs (g)(3) through (5)—that devices be fully operational and maintained.

Renumbered § 36.303(g)(5) of the final rule retains the performance requirements proposed in the NPRM, but it has been restructured for clarity.

Section 36.303(g)(6) Alternative Technologies

Although commenters on the 2010 Advance Notice of Proposed Rulemaking, 75 FR 43467 (July 26, 2010) (ANPRM), encouraged the Department to require open movie captioning at movie theaters, the Department declined to make such a proposal in the NPRM, noting that in the debate leading up to passage of the ADA, the House Committee on Education and Labor explicitly stated that “[o]pen-captioning, for example, of feature films playing in movie

theaters, is not required by this legislation.” H.R. Rep. No. 101–485, pt. 2, at 108 (1990). The Senate Committee on Labor and Human Resources included a statement in its report on the ADA to the same effect. S. Rep. No. 101–116, at 64 (1989). As the House Committee also recognized, however, “technological advances * * * may require public accommodations to provide auxiliary aids and services in the future which today would not be required because they would be held to impose undue burdens on such entities.” H.R. Rep. No. 101–485, pt. 2, at 108.

The Department included a provision in the NPRM giving movie theater owners and operators the choice to use other technologies to comply with the captioning and audio description requirements of this rule. Proposed § 36.303(g)(2)(ii) provided that “[m]ovie theaters may meet their obligation to provide captions to persons with disabilities through use of a different technology, such as open movie captioning, so long as the communication provided is as effective as that provided to movie patrons without disabilities. Open movie captioning at some or all showings of movies is never required as a means of compliance with this section, even if it is an undue burden for a theater to exhibit movies with closed movie captioning in an auditorium.”

Commenters disagreed on whether this provision struck an appropriate balance between the cost to movie theaters, the benefit to individuals with hearing and vision disabilities, and the impact on the movie-going experience for individuals without disabilities. The majority of comments on this provision concerned open movie captioning. Although some commenters expressed concern that an open-movie-captioning requirement would have an impact on the cinematic experience of hearing patrons, most commenters argued that the Department should require open movie captioning. Several open-movie-captioning requirements were proposed by commenters, including: Requiring open movie captioning at 100 percent of showings; requiring one open-captioned movie per day; requiring dedicated open-captioned auditoriums; or requiring open movie captioning if closed movie captioning is unavailable for any reason. One commenter who supported an open-movie-captioning requirement asserted that 95 percent of the deaf and hard of hearing community prefers open movie captioning to the use of captioning devices.

The commenters proposing an open-movie-captioning requirement ultimately disagreed with the Department’s interpretation of the legislative history as indicating congressional intent that the ADA did not require the provision of open movie captions at movie theaters. One commenter reasoned that because modern open movie captioning is significantly different from the open movie captioning available in 1990, the legislative history on this point represents a latent ambiguity. Therefore, in this commenter’s view, the Department is not bound by the legislative history concerning open movie captioning and is free to require it. Other commenters, however, agreed with the

Department's statement in the NPRM and argued that because the legislative history states that open movie captioning is not required as a means of compliance with the ADA, the rule should not mandate any conditions concerning open-captioned showings.

In response to the Department's questions concerning the parameters of the option to provide open movie captioning rather than closed movie captioning, several commenters suggested that the Department define what constitutes a "timely request" when a movie patron requests open movie captioning. These commenters provided a variety of suggestions, which ranged from the specific (e.g., 1 hour or 1 day before the showing) to the ambiguous (e.g., it should be reasonably easy).

Other comments also addressed whether the Department adequately addressed new technology. One commenter agreed that the "different technology" language encompassed any future technology, but further suggested that the effectiveness of new technologies should be judged from the baseline of "as effective as captioning and/or audio description devices." Other commenters disagreed and criticized the rule for not addressing other currently available technologies, such as hearing loop systems, Invisivision™ glasses, or smart phone applications.

After considering all of the comments, the Department has decided to retain the option to comply with the captioning and audio description requirements of this rule through the use of any other technology that is or becomes available to provide effective communication to patrons with hearing and vision disabilities, including open movie captioning. The Department has clarified, however, that in those circumstances where a public accommodation chooses to use open movie captioning at all showings of all movies available with captioning or at all times it receives a request to turn on open movie captions prior to the start of the movie, it is not also required to comply with the specific requirement to obtain captioning devices. However, if a public accommodation only makes open movie captioning available to patrons who are deaf or hard of hearing at some showings of movies available with captioning, it will still have to comply with the requirements to provide captioning devices because it must provide effective communication at all showings of all movies available with captioning.

The Department has made other changes to the structure and language of this provision in response to comments and to better preserve the intent and longevity of this paragraph. The final rule now reads "through any technology," instead of "through use of different technology." Although the Department declines to endorse specific technologies, the Department believes that the revised language better articulates the purpose of this paragraph to encompass current and future technologies that may serve individuals with hearing and vision disabilities. The requirement that public accommodations provide auxiliary aids and services to ensure communication as effective as that provided to movie patrons

without disabilities remains unchanged as that is the standard for effective communication required by § 36.303(c). See 28 CFR part 36, app. C (explaining that public accommodations must provide appropriate auxiliary aids and services "to ensure that communication with persons with disabilities is as effective as communication with others").

The Department maintains its view that Congress did not intend the ADA to require movie theaters to provide open movie captioning. Although the technology to provide open movie captioning has changed and enables movie theaters to provide the service more easily, open movie captioning as it exists today remains visible to all movie patrons and has not changed in this respect. As a result, the Department's position remains consistent with the legislative history on this point, and the final rule retains the language (with some minor edits) in proposed § 36.303(g)(2)(ii), which provided that "[o]pen movie captioning at some or all showings of movies is never required as a means of compliance with this section, even if it is an undue burden for a theater to exhibit movies with closed movie captioning in an auditorium." In the final rule, however, the Department has moved this language to new § 36.303(g)(10).

The revised provision addressing other technologies, renumbered in the final rule as § 36.303(g)(6), enables a public accommodation to meet its obligation to provide captioning and audio description through alternative technologies that provide effective communication for movie patrons with hearing and vision disabilities. Section 36.303(g)(6) further provides that a public accommodation may use open movie captioning as an alternative to complying with the captioning device scoping requirements of this rule by providing open movie captioning at all showings, or whenever requested by or for an individual who is deaf or hard of hearing.

Section 36.303(g)(7) Compliance Date for Providing Captioning and Audio Description

In the NPRM, the Department proposed at § 36.303(g)(4)(i) that all movie theaters with auditoriums displaying digital movies must comply with the requirements of the rule within 6 months of the publication date of the final rule. The Department also proposed to give movie theaters that converted their auditoriums with analog projection systems to digital projection systems after the publication date of the rule an additional 6 months from the date of conversion to comply with the rule's requirements. Although the Department expressed the belief that 6 months was sufficient time for movie theaters to order and install the necessary equipment, train employees on how to use the equipment and assist patrons in using it, and notify patrons of the availability of these services, the Department requested public comment on the reasonableness of a 6-month compliance date.

The Department received many comments both against and in favor of the proposed 6-month compliance date. A minority of comments from a few disability advocacy

groups and a few private citizens supported the proposed 6-month compliance date. These commenters asserted that because most movie theaters had already committed to providing captioning and audio description to their patrons by the end of 2014, the 6-month compliance date was, in their view, reasonable.

The vast majority of commenters, however, asserted that 6 months was not enough time for the remaining movie theaters to comply with the requirements of this rule. These comments raised concerns about manufacturers' ability to sustain the sudden, increased demand that the scoping requirements would likely create for captioning and audio description devices. Industry commenters stated that movie theaters already experience considerable delays between order date and delivery date and that, with increased demand and a limited supply, the prices of these devices would likely increase, especially for lower volume purchasers. Industry commenters further advised the Department that a trained technician must install the captioning and audio description equipment and that their experience indicates that there is a waiting period for such services. Commenters also expressed concern that the compliance date proposed in the NPRM was drastically different from the phased compliance date proposed in the ANPRM and that the Department's rationale for the change was insufficient.

Finally, some commenters expressed concern that small movie theaters in particular would have difficulty complying with the requirements of the rule within the proposed 6-month compliance date. Commenters advised that small movie theaters would need additional time to raise the necessary funds or adjust their budgets in order to purchase the equipment.

Based on these concerns, commenters offered a variety of alternative compliance dates. The Joint Comment suggested that the Department require movie theaters to issue purchase orders for the equipment within 6 months of the final rule's publication, but require fully functional and operational devices and trained staff either within 2 years of the final rule's publication or 6 months of system delivery, whichever came first. Other commenters suggested compliance dates ranging from 1 year to 4 years. One major movie theater chain in particular recommended an 18-month compliance date, stating that this is the amount of time that it currently takes to order and install the necessary equipment. Some commenters suggested a sliding compliance schedule based on a movie theater's gross revenue or a movie theater's size, and others suggested a phased compliance date similar to the schedule articulated in the ANPRM.

In consideration of these comments and the Department's independent research, the Department agrees that 6 months may be an insufficient amount of time for movie theaters to comply with the requirements of paragraph (g) of this section, and the Department instead will require compliance beginning 18 months from the date of publication of the final rule. The Department believes that an 18-month compliance period

sufficiently accounts for potential delays that may result from manufacturer backlogs, installation waitlists, and other circumstances outside a movie theater's control. This date also gives small movie theaters that are financially impacted as a result of the unrelated costs of digital conversion a sufficient amount of time to plan and budget accordingly. The Department declines to include a requirement that movie theaters issue purchase orders for the equipment within 6 months of the final rule's publication because such a requirement is unenforceable without imposing recordkeeping and reporting requirements.

The final rule continues to provide additional time for movie theaters converting their auditoriums from analog projection systems to digital projection systems after the publication date of the final rule. Once the installation of a digital projection system is complete, meaning that the auditorium has installed the equipment needed to exhibit a digital movie, the movie theater has at least an additional 6 months to ensure compliance with the requirements of the rule and provide closed movie captioning and audio description when showing digital movies in that auditorium. Renumbered § 36.303(g)(7)(ii) states that "[i]f a public accommodation converts a movie theater auditorium from an analog projection system to a system that allows it to exhibit digital movies after December 2, 2016, then that auditorium must comply with the requirements in paragraph (g) of this section by December 2, 2018, or within 6 months of that auditorium's complete installation of a digital projection system, whichever is later." The Department believes that this approach will provide movie theaters in the process of converting to digital projection after the publication date of the rule a sufficient amount of time to acquire the necessary equipment to provide captioning and audio description.

Section 36.303(g)(8) Notice

The Department believes that it is essential that movie theaters provide adequate notice to patrons of the availability of captioned and audio-described movies. In the NPRM, the Department proposed at § 36.303(g)(5) that movie theaters provide information regarding the availability of captioning and audio description for each movie in communications and advertisements intended to inform potential patrons of movie showings and times and provided by the theaters through Web sites, posters, marquee, newspapers, telephone, and other forms of communication.

Commenters on the NPRM unanimously supported the inclusion of some form of a notice requirement in the final rule but differed on the scope of that requirement. Some commenters supported requiring notice in all places where a captioned or audio-described movie is advertised, and another commenter asked the Department to include as many forms of communication as possible in the language of the final rule, including mobile phone applications. These commenters reasoned that individuals who are deaf or hard of hearing, or blind or have

low vision, should be able to find this information easily. Several other commenters, however, asked the Department to limit the notice requirement to the box office, ticketing locations, and the movie theater's Web site. Although such commenters raised concerns about the high cost associated with a requirement that covers all communications and advertisements, they offered no other rationale for why they were proposing a limited requirement.

In addition to the scope of the requirement, commenters also addressed the form of the notice required. One commenter requested that the Department require a uniform notice by all movie theaters, and another commenter suggested that the Department require movie theaters to include within the notice the universal symbols for captioning and audio description as well as the type of device available.

Other commenters pointed to industry realities in order to highlight their concerns with the proposed provision. Some commenters expressed concern that movie theaters would be liable for a third party's failure to include information about captioning and audio description availability in their communications although movie theaters lack control over these communications. Commenters also advised the Department that there may be circumstances where compliance with the notice requirement would be difficult for some types of media. These commenters contend, for example, that movie theaters often book a film without knowing whether it is captioned or audio-described and that print deadlines may materialize before that information is available.

After considering these comments and the information available to the Department, the Department has revised its proposed notice language. The Department agrees that notice may not be necessary on all forms of communications and advertisements but disagrees that the notice obligation should be limited only to the box office, ticketing locations, and the movie theater's Web site. For example, telephone recordings serve an especially important medium of communication for individuals who are blind or have low vision and who may not utilize Web-based or print media to access information concerning movie showings. Similarly, newspapers serve an especially important medium of communication for individuals who may not use Web-based media generally. Moreover, according to the Department's research, movie theaters utilize proprietary mobile phone applications to inform potential patrons of movie showings and times, and some already advertise the availability of captioning and audio description devices on these applications.²

² The Department's research indicates that the following movie theater companies operate mobile phone applications and advertise the availability of captioning and audio description on these platforms: Regal Entertainment Group, AMC Theatres, Cineplex Entertainment, and Harkins Theatres. See, e.g., American Multi-Cinema, Inc., AMC Theatres (Version 5.2.2, 2016) (mobile application software), available at <https://itunes.apple.com/us/app/amc-theatres/>

Therefore, the Department has decided to require movie theaters to provide notice on communications and advertisements provided at or on any of the following: The box office and other ticketing locations, Web sites, mobile apps, newspapers, and the telephone.

The Department declines to require a specific form of notice to describe the availability of captioning or audio description. The Department notes that movie theaters already appear to be using a relatively uniform method of advising the public about the availability of captioning and audio description. A review of Web sites and newspaper advertising indicates that movie theaters routinely use "CC" and "OC" to indicate the availability of closed and open movie captioning and "AD" or "DV" to indicate the availability of audio description.

As the Department specifically noted in the NPRM and makes clear in the final rule, the rule does not impose obligations on independent third parties that publish information about movies, and these third parties will not face liability under the ADA if they fail to include information about the availability of captioning and audio description at movie theaters.

Renumbered § 36.303(g)(8) of the final rule requires that whenever a public accommodation provides captioning and audio description in a movie theater auditorium exhibiting digital movies on or after January 17, 2017, its notices of movie showings and times, provided at the box office and other ticketing locations, on Web sites and mobile apps, in newspapers, and over the telephone, must inform potential patrons of the movies that are being shown with captioning and audio description. The final rule further provides that this obligation does not extend to third parties that provide information about movie theater showings and times, as long as the third party is not under the control of the public accommodation.

This provision applies to movie theaters once they provide captioning and audio description for digital movies on or after the effective date of the rule, January 17, 2017. Thus, movie theaters that already show digital movies with closed movie captions and audio description must comply with this provision as soon as the rule takes effect.

Section 36.303(g)(9) Operational Requirements

In response to the ANPRM, the Department received a significant number of comments from individuals with disabilities and groups representing persons who are deaf or hard of hearing and who are blind or have low vision strongly encouraging the Department to include a requirement that movie theater staff know how to operate captioning and audio description equipment and be able to communicate with patrons about the use of individual devices. Having considered those

id509199715?ls=1&mt=8 (last visited Sept. 12, 2016); Regal Cinemas, Inc., Regal—Movie Tickets and Showtimes for Regal Cinemas, United Artists and Edwards Theatres (Version 3.4.2, 2016) (mobile application software), available at <https://itunes.apple.com/us/app/regal-cinemas/id502912815?mt=8> (last visited Sept. 12, 2016).

comments, the Department included in the NPRM proposed § 36.303(g)(6), which required movie theaters to ensure that at least one individual was on location at each facility and available to assist patrons whenever showing a captioned or audio-described movie. The proposed § 36.303(g)(6) further required that such individual be able to operate and locate all of the necessary equipment and be able to communicate effectively with individuals with hearing and vision disabilities about the uses of, and potential problems with, the equipment.

All of the comments on the NPRM that addressed this proposed language acknowledged that staff training regarding the operation of equipment is vital to the proper functioning of the rule. A number of commenters stated that on numerous occasions when they attempted to go to a movie advertised as having captioning or audio description, there was no staff available who knew where the captioning devices were kept or how to turn on the captioning or audio description for the movie. Many of these commenters indicated that they were unable to experience the movie fully because of the lack of trained personnel, even if the auditorium was properly equipped and the movie was actually available with captioning or audio description.

A handful of commenters requested that the Department expand its proposed operational requirement, emphasizing concerns about movie theater staff's current knowledge concerning the operation of available equipment. One commenter encouraged the Department to specifically require all movie theater personnel to be properly and uniformly trained in providing such services, and other commenters suggested that all movie theater personnel be trained as to the availability of these services. Other comments encouraged the Department to enumerate specific requirements to ensure that movie theater staff is capable of operating the captioning and audio description equipment, including a requirement that management document employee training and a requirement that employees receive periodic refresher courses.

A few commenters questioned the need for the proposed language in § 36.303(g)(6)(iii), which required movie theaters to “[c]ommunicate effectively with individuals

who are deaf or hard of hearing and blind or have low vision regarding the uses of, and potential problems with, the equipment for such captioning or audio description.” One commenter asserted that an “effective communication” requirement in the proposed paragraph (g)(6)(iii) was superfluous given the overarching requirements in § 36.303(c). Other commenters supported the proposed language, stating that movie theater staff, including managers, often are not knowledgeable on how to properly communicate with individuals who are deaf, hard of hearing, blind, or have low vision. A State government also pointed out that in *Camarillo v. Carrols Corp.*, 518 F.3d 153, 157 (2d Cir. 2008) (per curiam), the Second Circuit held that a public accommodation's failure to provide employee training on effective communication with individuals with disabilities can constitute a violation of title III, specifically 42 U.S.C. 12182(b)(2)(A)(iii).

The final rule retains the operational requirements proposed in the NPRM in renumbered § 36.303(g)(9) and adds the requirement that if a movie theater is relying on open movie captioning to meet the requirements of paragraph (g)(3), it must also ensure that there is an employee available at the theater who knows how to turn on the captions. The Department declines to add a specific requirement that all personnel be trained, as it believes that it is sufficient if a movie theater has at least one knowledgeable employee on location at all times to ensure that the service is available and provided without interruption. While the Department agrees that it would be a good idea for movie theaters to implement reasonable staff training programs and periodic refresher courses, the Department declines to take these recommendations and has not included in the final rule specific logistical requirements concerning movie theater staff training.

The Department has decided to retain in the final rule the language in proposed § 36.303(g)(6)(iii) requiring movie theater staff to effectively communicate with individuals who are deaf or hard of hearing, or blind or have low vision, regarding the uses of, and potential problems with, the captioning and audio description devices. The Department notes, however, that

communicating effectively with patrons about the availability of captioning at a movie theater would not require a movie theater to hire a sign language interpreter. Communication with a person who is deaf or hard of hearing about the availability of these services or how to use the equipment involves a short and relatively simple exchange and therefore can easily be provided through signage, instructional guides, or written notes.

Final § 36.303(g)(9) requires that whenever a public accommodation provides captioning and audio description in a movie theater auditorium exhibiting digital movies on or after January 17, 2017, at least one theater employee must be available to assist patrons seeking or using the captioning or audio description equipment. The employee must be able to quickly locate and activate the necessary equipment; operate and address problems with the equipment prior to and during the movie; turn on the open movie captions if the movie theater is relying on open movie captions to meet its effective communication requirements; and communicate effectively with individuals with disabilities about how to use, operate, and resolve problems with the equipment.

This provision applies to movie theaters once they provide captioning and audio description for digital movies on or after the effective date of the rule, January 17, 2017. Thus, movie theaters that already show digital movies with closed movie captions and audio description must comply with this provision as soon as the rule takes effect.

Section 36.303(g)(10)

Section 36.303(g)(10) in the final rule provides that “[t]his section does not require the use of open movie captioning as a means of compliance with paragraph (g), even if providing closed movie captioning for digital movies would be an undue burden.” The NPRM proposed similar language at § 36.303(g)(2)(ii). See discussion of comments on final § 36.303(g)(6), *supra*.

Dated: November 21, 2016.

Loretta E. Lynch,
Attorney General.

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